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United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONTGOMERY WARD & COMPANY,
Respondent.

MONTGOMERY WARD & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 498

FILED

JUN 9 - 1942

PAUL P. O'BRIEN,
CLERK

Upon Petition for Enforcement and Upon Petition
for Review of An Order of the National
Labor Relations Board



United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
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vs.

MONTGOMERY WARD & COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Nineteenth Region
Case No. XIX C847

Date filed December 13, 1940

In the Matter of MONTGOMERY WARD
& COMPANY, and WAREHOUSEMEN'S
UNION, LOCAL No. 206, Affiliated with I.B.
of T., C., W., and H. of A.

CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Montgomery Ward & Company of Portland, Oregon, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that on April 5, 1940, the union filed a petition for election of all warehouse employees of Montgomery Ward & Company at Portland, Oregon; that a hearing was held in Portland, Oregon, on April 27th, 1940, and that on the 24th day of June, 1940, the National Labor Relations Board directed an election of all warehouse employees at Montgomery Ward & Company, Portland, and that on August 10, 1940, the National Labor Relations Board certified the union as the collective bargaining agent for all warehouse employees of Montgomery Ward & Company at Portland, Oregon. Representatives of the union have had

meetings with the company for the purpose of negotiating a collective bargain agreement between the union and the company, but that the company has consistently refused to negotiate wages, hours and working conditions and has taken the position that anything that the union proposed was contrary to company policy, and has refused to negotiate in good faith with the union; that there have been no actual negotiations and merely discussions, at which time the company has refused to negotiate on any of the terms, but merely states that the union's proposals are contrary to company policy with the result that no bona fide negotiations have taken place, and the company has consistently refused to bona fide negotiate, although often requested to do so.

That on December 7, 1940, because of the company's refusals to negotiate, the union, in concert with the Retail Clerks' Union and the Office Employees Union, which also have been denied negotiations with the company, went on strike; that such strike has been called because of unfair labor practices on the part of the company, namely, to bona fide negotiate.

That the company's refusal to negotiate was for the purpose of discouraging membership and to attempt to coerce employees to drop their union affiliation by well thought out plans of stalling, and to give the impression to the membership that the union could do nothing for them with the conse-

quence that the members would drop out of the union.

That since the strike has been called the company has gone around to individual members homes and threatened them that unless they came back to work at a certain time, they would never work for Montgomery Ward & Company again and they would be blacklisted. That this action on the part of the company was for the purpose of discouraging union membership and to defeat the purposes of collective bargaining.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

WAREHOUSEMEN'S UNION,
LOCAL No. 206, affiliated with
I. B. of T., C., W., & H. of A.,
Labor Temple,
Portland, Oregon.

By J. W. ESTABROOK,
Financial Secretary.

Subscribed and sworn to before me this 10th day of December, 1940, at Portland, Oregon.

(Seal) JAMES LANDYE,
Notary Public for Oregon.

My commission expires Dec. 15, 1943.

United States of America
Before the National Labor Relations Board
Nineteenth Region
Case No. XIX-C-851C
Date filed 12'21'40

In the Matter of MONTGOMERY WARD &
COMPANY and RETAIL CLERKS INTER-
NATIONAL PROTECTIVE ASSOCIATION,
LOCAL UNION No. 1257.

CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Montgomery Ward & Company of Portland, Oregon, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that the Retail Clerks Union represents an overwhelming majority of the retail clerks employed in the company's store in Portland, Oregon. Representatives of the union have had meetings with the company for the purpose of negotiating a collective bargaining agreement between the union and the company, but the company has consistently refused to negotiate wages, hours and working conditions and has taken the position that anything that the union proposed was contrary to company policy, and has refused to negotiate in good faith with the union: that there have been no actual negotiations and merely discussions, at which time the company has refused to

negotiate on any of the terms, but merely states that the union's proposals are contrary to company policy with the result that no bona fide negotiations have taken place, and the company has consistently refused to bona fide negotiate, although often requested to do so.

That on December 7, 1940, because of the company's refusals to negotiate, the union, in concert with the Warehousemen's Union and the Office Employees Union, which also have been denied negotiations with the company, went on strike; that such strike has been called because of unfair labor practices on the part of the company, namely, to bona fide negotiate.

That the company's refusal to negotiate was for the purpose of discouraging membership and to attempt to coerce employees to drop their union affiliation by well thought out plans of stalling, and to give the impression to the membership that the union could do nothing for them with the consequence that the members would drop out of the union.

That since the strike has been called the company has gone around to individual members homes and threatened them that unless they came back to work at a certain time, they would never work for Montgomery Ward & Company again and they would be blacklisted. That this action on the part of the company was for the purpose of discouraging union membership and to defeat the purposes of collective bargaining.

The undersigned further charges that said **unfair** labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

FRED DIXON,
RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, Local No. 1257,
Labor Temple,
Portland, Oregon.

Subscribed and sworn to before me this 19th day of December, 1940, at Portland, Oregon.

(Seal)

JAMES LANDYE,
Notary Public for Oregon.

My commission expires Dec. 15, 1943.

United States of America
Before the National Labor Relations Board

Case No. XIX-C-851

In the Matter of MONTGOMERY WARD & COMPANY and RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, LOCAL UNION No. 1257.

Case No. XIX-C-847

MONTGOMERY WARD & COMPANY and WAREHOUSEMEN'S UNION, LOCAL No. 206, Affiliated with I.B. of T., C., W., and H. of A.

ORDER CONSOLIDATING CASES

A charge, pursuant to Section 10 (b) of the Act, having been filed by Retail Clerks International Protective Association, Local Union No. 1257, in Case No. XIX-C-851, a charge having been duly filed by Warehousemen's Union, Local No. 206, affiliated with I. B. of T., C., W., & H. of A., in Case No. XIX-C-847, and the Board having duly considered the matter, and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act,

It Is Hereby Ordered, pursuant to Article II, Section 36 (b) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that Cases Nos. XIX-C-851 and XIX-C-847 be, and they hereby are, consolidated.

Dated, Washington, D. C., March 28, 1941.

By direction of the Board:

(Seal)

BEATRICE M. STERN,
Acting Secretary.

[Title of Board and Cause.]

CONSOLIDATED COMPLAINT

It having been charged in the above-entitled matters by Warehousemen's Union, Local No. 206, Chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federation of Labor, and Retail Clerks' International Protective Association, Local No. 1257, affiliated with the American Federation of Labor, that Montgomery Ward & Company, hereinafter called the respondent, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, and an Order having been duly made and entered by the National Labor Relations Board, consolidating the above-entitled matters, the National Labor Relations Board, by the Regional Director for the Nineteenth Region, as agent for the National Labor Relations Board, designated by National Labor Relations Board Rules and Regulations, Series 2, as amended, Article 4, Section 1, hereby issues its Consolidated Complaint and alleges the following:

I.

Montgomery Ward & Company, the respondent, is an Illinois corporation having its principal executive offices in Chicago, Illinois, and is licensed to do business in the State of Oregon, and owns and oper-

ates a mail order house and a retail store at Portland, Oregon.

II.

The respondent is engaged in and at all times hereinafter referred to has been continuously engaged in the business of distribution of merchandise through the media of mail order houses and retail stores. The respondent owns, operates, and maintains 9 mail order houses, 5 mail order warehouses, 260 order offices, and 625 retail stores throughout the United States. Approximately 20,000,000 customers throughout the United States and many foreign countries are served by the company. The company's net sales for the year 1939 amounted to \$474,882,032.00.

III.

In the course and conduct of the business of the respondent in its mail order house and retail store located in Portland, Oregon, the respondent caused about 90 per cent of the merchandise distributed by it to be shipped to Portland, Oregon, from States outside the State of Oregon. About 60 per cent of the customers of the mail order house live outside of the State of Oregon, and a substantial portion of the goods, sold by the respondent in its Portland, Oregon, mail order house is shipped out of the State of Oregon to such customers.

IV.

The Warehousemen's Union, Local No. 206, Chartered by the International Brotherhood of Team-

sters, Chauffeurs, Stablemen and Helpers of America, Affiliated with the American Federation of Labor, and the Retail Clerks' International Protective Association, Local No. 1257, Affiliated with the American Federation of Labor, are labor organizations, within the meaning of Section 2, Subsection 5, of the Act.

V.

All merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package opening department, except authenticators; all employees of the central repair unit except those engaged in office work; all employees in the jewelry repair unit engaged in handling merchandise, except watch makers; all employees in the merchandise division except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock control, and catalog service departments; all porters; and all employees at the warehouse, excluding supervisory employees, constituting a unit appropriate for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, in order to insure to said employees the full benefit of their right to self-organization and to collective bargaining, and to otherwise effectuate the policies of the Act.

VI.

On August 10, 1940, Warehousemen's Union, Local No. 206, was certified by the National Labor Relations Board as the representative of the employees in the unit described in Paragraph V, above. By reason of said certification and by virtue of Section 9 (a) of the Act, said Local No. 206, is and at all times since August 10, 1940, has been, the exclusive representative of all employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

VII.

All the retail clerks of respondent employed in its Portland, Oregon, plant who are engaged in selling in the retail store, constitute a unit appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, in order to insure to said employees the full benefit of their right to self-organization and to collective bargaining, and to otherwise effectuate the policies of the Act.

VIII.

On or before August 6, 1940, and at all times since that date, the majority of the employees in the unit described in Paragraph VII herein, designated and selected Retail Clerks' International Protective Association, Local No. 1257, as their representative for the purposes of collective bargaining with the respondent. By reason of said designation and by

virtue of Section 9 (a) of the Act, said Local No. 1257 is and at all times since August 6, 1940, has been the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

IX.

The said respondent has ever since on or about November 1, 1940, and specifically on or about November 12, 1940, November 25, 1940, and December 13, 14, and 16, 1940, refused to bargain collectively in good faith with the Warehousemen's Union, Local No. 206, and Retail Clerks' International Protective Association, Local 1257. Said unions had prior thereto been designated by a majority of the respondent's employees in the respective units described above as their representatives for the purpose of negotiating with respondent with relation to rates of pay, wages, hours of employment, and other conditions of employment. That said respondent refused and continues to refuse to bargain in good faith with Warehousemen's Union, Local No. 206, and Retail Clerks' International Protective Association, Local No. 1257, and said respondent has placed numerous obstacles in the way of bargaining in that although each of the unions above-mentioned presented proposed contracts to the respondent, the respondent objected to said contracts and refused to offer any counter proposal.

X.

As a result of said refusal on the part of respondent to bargain collectively in good faith and its refusal to submit counter proposals at the meetings which occurred prior to December 7, 1940, with Warehousemen's Union, Local No. 206, and Retail Clerks' International Protective Association, Local No. 1257, as described in Paragraph IX, above, said unions did on or about December 7, 1940, call a strike and establish picket lines about the premises of said respondent, which strike has continued ever since said date.

XI.

That by the refusal to bargain in good faith with Warehousemen's Union, Local No. 206, and Retail Clerks' International Protective Association, Local No. 1257, and its refusal to submit counter proposals to said unions, since on or about November 1, 1940, as alleged in Paragraph IX, above, the respondent did thereby engage in and is thereby engaging in unfair labor practices, within the meaning of Section 8, Subsection 5, of said Act.

XII.

That by refusal to bargain collectively in good faith as set out in Paragraph IX, and by various other acts, the respondent did interfere with, restrain, and coerce its employees in the exercise of the rights to organize and bargain collectively through representatives of their own choosing and by so doing, did engage in and is continuing to engage in unfair

labor practices, within the meaning of Section 8, Subdivisions (1) and (5) of said Act.

XIII.

The activities of the respondent alleged in Paragraphs IX, XI, and XII, occurring in connection with operations of the respondent as described in Paragraphs I, II, and III, herein, have a close, intimate, and substantial relation to trade, traffic, and commerce among several States of the United States and have led to and tend to lead to labor disputes burdening and obstructing interstate commerce and the free flow thereof.

XIV.

That the aforesaid acts of the respondent as set forth in Paragraph IX, XI, and XII, constitute unfair labor practices affecting commerce within the meaning of Section 8, Subdivisions (1) and (5) and Section 2, Subdivisions (6) and (7) of said Act.

Wherefore, the National Labor Relations Board on the 31st day of March, 1941, issues its complaint against the Montgomery Ward & Company, the respondent herein.

(Seal)

ELWYN J. EAGEN,
Regional Director,
National Labor Relations
Board,
Nineteenth Region,
407 U. S. Court House
Seattle, Washington.

[Title of Board and Cause.]

NOTICE OF HEARING

Please Take Notice that on the 14th day of April 1941, at ten o'clock in the forenoon in a court room of the Federal Court House, Portland, Oregon, a hearing will be conducted before the National Labor Relations Board by a Trial Examiner to be designated by it in accordance with the Rules and Regulations, Series 2, as amended, Article II, Section 23, on the allegations set forth in the Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the Nineteenth Region, acting in this matter as agent of the National Relations Board, an answer to the Consolidated Complaint within ten (10) days of service of said Consolidated Complaint.

Enclosed herewith for your information is a copy of Rules and Regulations, Series 2, as amended, made and published by the National Labor Relations Board pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and Regulations.

In Witness Whereof the National Labor Relations Board has caused this, its notice of hearing, to be signed by the Regional Director for the Nine-

teenth Region on the 31st day of March 1941.

(Seal)

ELWYN J. EAGEN,

Regional Director, National
Labor Relations Board,
Nineteenth Region
407 U. S. Court House,
Seattle, Washington.

[Title of Board and Cause.]

ANSWER

Comes now Montgomery Ward & Co., Incorporated, respondent herein, and for its Answer to the Consolidated Complaint states the following:

I.

It admits the allegations of numbered paragraph I of the Consolidated Complaint.

II.

It admits the allegations contained in paragraph II of the Consolidated Complaint, except as inconsistent with the facts hereinafter stated. The respondent in the operation of its business of selling at retail through mail order and retail stores operated on January 31, 1941 nine mail order houses, 650 retail stores, and 206 mail order sales units located in the several states of the United States and its territories. The respondent's net sales for the fiscal year ended January 31, 1941 amounted to \$515,910,915.00.

III.

The respondent admits the allegations of paragraph III of the said Consolidated Complaint.

IV.

The respondent admits the allegations of paragraph IV of said Consolidated Complaint.

V.

The respondent denies the allegations set forth in paragraph V of the said Consolidated Complaint. The respondent further alleges that the employees described in said paragraph V of the Consolidated Complaint do not constitute an appropriate unit for purposes of collective bargaining for the following among other reasons, to wit: that said employees are not employed in a single department of the respondent and are not under a single management distinct from the management of other employees; that the said employees are employed in different branches of the respondent's operations and have a less close relationship in the matter of hours, rates of pay, and working conditions than the relationship between said employees and other employed by the respondent in its Portland branch; that the employees so defined have no relationship to each other, and the unit so defined is arbitrary and capricious in character and has no relation whatsoever to the purposes of collective bargaining; that the respondent cannot practically deal with the representatives of such a unit of employees with respect to their

rates of pay, hours of labor, and working conditions separate and apart from the rates of pay, hours of labor, and working conditions of others of its employees in the Portland branch; that the practical impossibility of the respondent to deal with such a unit would tend to defeat the purposes of collective bargaining; that the work performed by said employees is integrally related to the work performed by many others of respondent's employees in its Portland branch, and that any problems affecting said unit of employees equally affects other of respondent's employees in its Portland branch; that the work of the said employees is so related to the work of other of respondent's employees in its Portland branch that should any dispute arise between the said employees and the respondent in the course of collective bargaining said dispute would equally affect other employees not included within said unit; that the only units appropriate for purposes of collective bargaining in respondent's Portland branch are first, the unit comprised of all of its employees in the mail order house exclusive of management representatives, and second, all of its employees in its retail store exclusive of the manager and his direct assistants; that the personnel policies of the respondent in the two units described are unitarily determined; that the management policies of the respondent in its two units are uniformly applied; and that the only effective agreements that could be reached as a result of collective

bargaining would be agreements covering all of the employees in the said units.

VI.

The respondent admits in answer to paragraph VI of the said Consolidated Complaint, that Warehousemen's Union, Local No. 206, was certified by the National Labor Relations Board on August 10, 1940 as the representative of the employees described in paragraph V of the said Consolidated Complaint; but respondent further alleges that such unit was not and is not now an appropriate unit for the purposes of collective bargaining for the reasons set forth in paragraph V of this Answer. Respondent denies the other allegations contained in said paragraph VI of the said Consolidated Complaint.

VII.

Respondent denies each and every allegation set forth in paragraph VII of the said Consolidated Complaint and alleges for the reasons set forth in paragraph V above that the only unit appropriate for the purposes of collective bargaining in the respondent's Portland retail store is composed of all of the employees employed in the said retail store exclusive of the manager and his direct assistants.

VIII.

As to the allegations contained in paragraph VIII of the said Consolidated Complaint, this respondent has no information sufficient to form a

belief and therefore denies the same and demands strict proof thereof.

IX.

The respondent denies each and every allegation contained in paragraph IX of the said Consolidated Complaint.

X.

In answer to the allegations contained in paragraph X of the said Consolidated Complaint, the respondent admits that on or about December 7, 1940, picket lines were established about the premises of said respondent at Portland, Oregon. Respondent denies each and every allegation of said paragraph X of said Consolidated Complaint except as above admitted. Respondent further alleges that said picket lines were established solely because of the respondent's refusal to agree that any collective bargaining agreement that might be eventually reached with representatives of its employees at Portland, Oregon contain a so-called "closed shop" or "union shop" clause.

XI.

Respondent denies each and every allegation set forth in paragraph XI of said Consolidated Complaint.

XII.

Respondent denies each and every allegation set forth in paragraph XII of said Consolidated Complaint.

XIII.

Respondent denies each and every allegation set forth in paragraph XIII of said Consolidated Complaint.

XIV.

Respondent denies each and every allegation set forth in paragraph XIV of said Consolidated Complaint.

Wherefore, the Respondent respectfully prays that the Complaint against it be dismissed.

**MONTGOMERY WARD & CO.,
INCORPORATED,
STUART S. BALL,**

Secretary,
619 West Chicago Avenue,
Chicago, Illinois.

State of Illinois
County of Cook—ss.

I, Stuart S. Ball, being first duly sworn, on oath depose and state that I am the Secretary of Montgomery Ward & Co., Incorporated, respondent herein, that in such capacity I have affixed my name to the above Answer, and that I have read the contents and believe them to be true.

STUART S. BALL.

Subscribed and sworn to before me this seventh (7th) day of April, 1941.

(Seal) **M. N. KING,**
Notary Public.

My Commission Expires February 8, 1942.

United States of America
Before the National Labor Relations Board

Case No. C-1905

In the Matter of
MONTGOMERY WARD & COMPANY

and

WAREHOUSEMEN'S UNION, LOCAL No. 206,
CHARTERED BY THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, STABLEMEN AND HELPERS OF
AMERICA, Affiliated with the American Fed-
eration of Labor.

Case No. C-1906

In the Matter of
MONTGOMERY WARD & COMPANY

and

RETAIL CLERKS' INTERNATIONAL PRO-
TECTIVE ASSOCIATION, LOCAL No. 1257,
Affiliated with the American Federation of
Labor.

Mr. Patrick H. Walker, for the Board.

Mr. Stuart S. Ball, of Evanston, Ill., for the re-
spondent.

Mr. James Landye, of Portland, Oreg., for the
Unions.

Mr. William T. Little, of counsel to the Board.

DECISION AND ORDER

Statement of the Case

Upon charges duly filed by Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federation of Labor, herein called the Warehousemen, and Retail Clerks' International Protective Association, Local No. 1257, affiliated with the American Federation of Labor, herein called the Retail Clerks,¹ and collectively called the Unions, the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued a consolidated complaint² dated March 31, 1941, against Montgomery Ward & Company, Portland, Oregon, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent, the Warehousemen, and the Retail Clerks.

The complaint, as amended at the hearing, alleged

(1) The Warehousemen filed a charge on December 13 and the Retail Clerks on December 21, 1940.

(2) The Board, on March 28, 1941, ordered that Cases Nos. C-1905 and C-1906 be consolidated.

in substance: (1) that the respondent, on or about November 12 and 25, and December 13, 14, and 16, 1940, refused to bargain collectively with the Warehousemen, which had been certified by the Board³ as the representative of the employees in an appropriate unit, and with the Retail Clerks, which represented a majority of the employees in an appropriate unit; (2) that on or about December 7, 1940, the Unions called a strike because of the respondent's refusal to bargain collectively; and (3) that the respondent by its refusal to bargain and by other acts interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. On April 8, 1941, the respondent filed its answer, denying that it had engaged in the alleged unfair labor practices.

Pursuant to notice a hearing was held at Portland, Oregon, from April 14 to 17, 1941, before George Bokat, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Unions were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the hearing, the counsel for the Board moved to amend the complaint with regard to the unit claimed to be appropriate by the Retail Clerks. He further moved

(3) Matter of Montgomery Ward & Company and Warehousemen's Union, Local No. 206, 26 N.L.R.B., No. 46.

that the pleadings be conformed to the proof. These motions were granted. At the conclusion of the hearing, counsel for the respondent moved to dismiss the complaint. Decision on this motion was reserved and denied by the Trial Examiner in his Intermediate Report. During the course of the hearing, the Trial Examiner made several rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On June 11, 1941, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the respondent and the Unions. In his Intermediate Report, the Trial Examiner found that the respondent had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act and recommended that the respondent cease and desist from such unfair labor practices, and take certain affirmative action designed to effectuate the policies of the Act.

Thereafter, the respondent filed a brief and exceptions to the Intermediate Report. Pursuant to notice duly served upon the respondent and the Unions, a hearing for the purpose of oral argument was held at Washington, D. C., on August 5, 1941. The respondent was represented by counsel and presented oral argument. The Unions did not appear. The Board has considered the respondent's

exceptions to the Intermediate Report, and its brief in support thereof, and insofar as the exceptions are inconsistent with the findings, conclusions, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. The business of the respondent

The respondent, an Illinois corporation with its principal office in Chicago, Illinois, is engaged in the sale and distribution of merchandise through mail-order houses and retail stores. It owns, operates, and maintains 9 mail-order houses, 650 retail stores, and 206 mail order sales units throughout the United States. The respondent's net sales for the fiscal year ended January 31, 1941, amounted to \$515,910,915.

This proceeding involves only the employees in Portland, Oregon, where the respondent operates a mail-order house and a retail store. Approximately 90 percent of the merchandise distributed by the mail-order house and the retail store is shipped to Portland from outside the State of Oregon. The retail-store sales amount to about \$3,000,000 annually, the mail-order house sales to about \$13,000,000 annually. Approximately 60 percent of the sales made by the mail-order house and about one-half percent of the retail-store sales are delivered to customers who live outside the State of Oregon. At

the time of the hearing, the respondent employed about 1,200 persons in the mail-order house and 175 in the retail store. The respondent denies the Board's jurisdiction over the retail store, but we find such contention to be without merit.⁴

II. The organizations involved

Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, is a labor organization affiliated with the American Federation of Labor. It admits to membership warehouse employees of the respondent.

Retail Clerks' International Protective Association, Local No. 1257, is a labor organization affiliated with the American Federation of Labor. It admits to membership employees of the respondent engaged in selling and handling merchandise.

III. The unfair labor practices

A. The refusals to bargain collectively

1. The appropriate unit

In the Matter of Montgomery Ward & Company and Warehousemen's Union, Local No. 206,⁵ we found that all merchandise checkers in the shipping

(4) In another proceeding the Board assumed jurisdiction over employees of the retail store. Matter of Montgomery Ward & Company and Reuben Litzenberger et al., 9 N.L.R.B. 538, enf'd Montgomery Ward & Company v. National Labor Relations Board, 107 F. (2d) 555 (C.C.A. 7).

(5) 24 N.L.R.B., No. 100.

department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package-opening department, except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit engaged in handling merchandise, *except* watchmakers; all employees in the merchandise division except time-keepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating, auditing, stock-control, and catalog-service departments; all porters; and all employees at the warehouse, excluding supervisory employees, constitute an appropriate unit. The respondent adduced no evidence at the hearing in the present proceeding which would cause us to deviate from our former decision,⁶ and we accordingly find that the employees within the unit found appropriate in the earlier case at all times herein material constituted and now constitute a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, and that said unit insures to employees of the respondent the full benefit of their

(6) At the hearing in the present proceeding the respondent made substantially the same contentions that it made in the earlier representation case.

right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

The unit claimed by the Retail Clerks has not been the subject of prior determination. The Retail Clerks claims that all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees, constitute an appropriate unit. The respondent claims that all the employees of the retail store, exclusive of the manager and his direct assistants, constitute an appropriate unit. The unit proposed by the Retail Clerks differs from that proposed by the respondent primarily in that it excludes from the unit employees who are eligible for membership in other labor organizations affiliated with the American Federation of Labor and are therefore ineligible for membership in the Retail Clerks. Thus, for the most part, the employees excluded from the unit proposed by the Retail Clerks are eligible for membership in the Office Employees Union, a labor organization likewise affiliated with the American Federation of Labor, which has been organizing these employees. Organization of the employees has proceeded upon the basis of the Retail Clerks' unit and it appears to be the only labor organization among the employees herein involved. The respondent has not entered into written collective bargaining agreements with any labor organization at its mail-order houses or retail stores. As appears below, the re-

spondent negotiated jointly with the Retail Clerks and the Office Employees Union. Each organization, however, represented different categories of employees.⁷

In the past we have generally excluded office employees from units composed of non-office workers.⁸ In view of the negotiations, the fact that the employees sought to be excluded from the unit are within the jurisdiction of other labor organizations, and the further fact that the three labor organizations herein named have organized the respondent's employees into three different units, we find that the unit sought by the Retail Clerks is appropriate. Accordingly we find that all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees, at all times herein material constituted, and now consti-

(7) The respondent points to a letter sent to it on October 2, 1940, by the Retail Clerks and the Office Employees Union which indicated the two unions' willingness jointly to negotiate and sign one contract to cover the office workers and retail clerks in the retail store, as some proof of the appropriateness of the unit contended for by it. As set forth below, however, separate contracts were submitted by these unions and by the Warehousemen, although joint discussions did take place on all three contracts, on December 13, 14, and 16, 1940.

(8) Cf. *Montgomery Ward & Company, Incorporated and Retail Clerks Int'l. Protective Ass'n., etc.*, 28 N.L.R.B., No. 145.

tute, a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and conditions of employment, and that said unit insures to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Unions of a majority in the appropriate units.

The Warehousemen was certified by the Board on August 10, 1940, as the exclusive representative of the unit of warehouse employees, found in the prior representation proceeding and above to be appropriate. Accordingly we find that on August 10, 1940, and at all times thereafter, the Warehousemen was, and now is, the duly designated representative of a majority of the employees in an appropriate unit and, pursuant to Section 9 (a) of the Act, the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

The Retail Clerks commenced organizational activities among the respondent's employees in February or March 1940. Fred Dixon, secretary-treasurer of the Retail Clerks, produced at the hearing all the applications for membership received by this union from employees of the respondent. His testimony that at all times subsequent to August 6, 1940, the Retail Clerks had signed applications from

a majority of the employees within the unit of retail clerks found above to be appropriate is unquestioned. During the negotiations the respondent did not dispute, and in fact accepted, the majority claim made by the Retail Clerks.⁹ The pay roll furnished by the respondent to determine the number of employees within the unit found to be appropriate as to the Retail Clerks is dated December 5, 1940. The number of employees on the pay roll of the retail store subsequent to November 1, 1940, at no time exceeded the number on the December 5 pay roll which shows 217 employees within the appropriate unit, 142 of whom signed applications for membership in the Retail Clerks on or before December 6. Subsequent to December 7, 1940, the Retail Clerks received 46 additional applications.

We find that on August 6, 1940, and at all times thereafter, the Retail Clerks was, and now is, the duly designated representative of a majority of the employees in an appropriate unit and, pursuant to Section 9 (a) of the Act, the exclusive representative of all the employees in such unit for the pur-

(9) When representatives of the respondent and the Retail Clerks formally met for the first time on September 19, 1940, to consider the proposed contract presented by the Retail Clerks, the latter submitted three alternative proposals in respect to its majority claim: (1) a consent Board election, (2) a check by an independent auditor of its applications against the company pay roll, and (3) acceptance of its claim that it represented a majority. The respondent adopted the last alternative.

poses of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusals to bargain.

a. Chronology of events

The dates of the principal conferences with the Warehousemen were November 12 and 25, 1940; with the Retail Clerks, September 19, October 22, and November 25, 1940. These conferences were separately conducted with the exception of the one on November 25, in which both unions joined. On December 7, 1940, both unions declared a strike against the respondent and established picket lines, allegedly because of the respondent's refusal to bargain on the dates set forth above. Subsequent to the commencement of the strike, on December 13, 14, and 16, 1940, the respondent met with the Unions in an endeavor to settle the strike and to negotiate agreements. It is alleged that on the dates set forth above the respondent again refused to bargain collectively with the Unions within the meaning of the Act. The strike was still in effect at the time of the hearing.

In order to determine whether or not there was a refusal to bargain it is necessary to discuss these conferences in some detail. First, it should be noted that what transpired at these meetings is substantially not in dispute. Secondly, it should be noted that sometime prior to its first formal meeting with each union, the respondent had received from each

a proposed written contract. The respondent's official in charge of labor relations and collective bargaining for all its stores and mail-order houses is John A. Barr. The latter authorized W. B. Powell, the respondent's West Coast labor representative, with the assistance of E. L. Barth, the Portland retail-store manager, and O. W. Huddleston, the Portland mail-order house manager, to carry on negotiations with the Unions. The principal negotiator for the Warehousemen was J. W. Estabrook, its financial secretary, and for the Retail Clerks, the same Dixon referred to above. Assisting both Unions, at times, was James Landye, their attorney, and other representatives of the Unions.

The respondent met with representatives of the Retail Clerks on September 19. At this meeting the discussion centered chiefly about the questions of the appropriate unit and whether or not the union represented a majority. The respondent stated that it wanted to negotiate a single contract for both the retail clerks and the office employees. In reply to the Retail Clerks' question of whether or not the respondent would sign a contract embodying such terms as might be agreed upon, Powell replied that so far as he knew the respondent had no signed contract with a labor organization and that the parties should leave the question of the signed contract until they had completed negotiations. About October 2, the Retail Clerks and the Office Employees Union informed the respondent that they

would be willing to negotiate one contract for the retail store. The respondent agreed to accept the Retail Clerks' statement that it represented a majority of the clerks.

On October 11, preparatory to the next conference between the Retail Clerks and the respondent, which was held on October 22, Barr instructed Powell as follows:

we stand ready to discuss with the Union each of their demands and to explain clearly and frankly the Company's position in regard to each demand. You may further tell the Unions that they can consider your statement of the Company's position as a counterproposal if they desire; . . . I don't see that we should quibble over the term "counterproposal" and I suspect that, in effect, our statement of the Company's position with regard to any union demand is a counterproposal. To date, however, we have not submitted any formal written counterproposal to a union. **If you have a situation** arise where you think it would be advisable to submit a formal counterproposal, I would appreciate your getting in touch with me before doing so.

As noted below, throughout the negotiations with both Unions, Powell repeatedly refused the Unions' requests to submit a formal counterproposal setting forth in writing the terms upon which it would be willing to contract with the Unions.

The Retail Clerks' proposed agreement contained 41 sections, chief of which were the demands for a union shop, an increase in wages, observance of seniority, and arbitration of all disputes arising under the terms of the agreement. At the October 22 meeting, the parties got no further than a discussion of the union-shop clause, which Powell rejected as against company policy. The events of this conference are described in Powell's letter of October 24 to Barr, which states in part the following:

Our reply was that we could not agree to Section 1 (union shop clause). We stated that in order to agree to Section 1 we would have to violate our Company policy, which we would not do. Then Dixon said he would have to return to the employees to give them our position and that he did not know what action they would decide to take.

The next day . . . Dixon called and asked if we had any counterproposal to offer . . . I explained that Section 1 proposed that we agree to something which is contrary to the policy of our Company and our counterproposal would be that the work of organizing the employees should be done by the union . . . Also, I called to Mr. Dixon's attention the fact that he decided not to discuss the remaining provisions of the proposed agreement, whereas we had come to the meeting prepared to discuss each provision. He then asked if we had any counter-

proposal to offer as to the entire contract. To this question I replied that there was certainly no reason to talk counterproposal for the entire contract, as the only provision which had been discussed was Section 1.

The next meeting of the respondent with representatives of the Retail Clerks did not take place until November 25, and was held jointly with representatives of the Warehousemen. In the meanwhile, a meeting between the Warehousemen and the respondent had taken place on November 12.

On November 1, 1940, in preparation for the November 12 conference, Barr wrote Powell a letter which set forth the respondent's position on each article of the contract proposed by the Warehousemen. Thus, concerning the proposal that employees who were required to work more than 5 consecutive hours without a meal period should be compensated at overtime rates, Barr stated:

There may be some peculiar situation in Portland at which Article 7 is aimed and I would hesitate to express an opinion without knowing all the facts. It would seem, however, that under normal conditions an employee should not be worked more than five consecutive hours without a meal period.

Concerning Article XI of the Warehousemen's proposal, the first and second sentences of which provided that there should be no strikes or lock-outs during the life of the agreement, and the third

sentence of which exempted certain strikes authorized by the Portland Central Labor Council from the operation of the "no-strike" clause, Barr instructed Powell as follows:

We certainly can have no objection to the first sentence of Article 11. In fact, this is a sentence which we should probably insist upon being included in connection with any agreement. I should say that we have no objection to the second sentence of Article 11, and that the third sentence is one which should be bargained and as to which you should exercise your own judgment on whether to give or not.

The proposed contract of the Warehousemen contained 14 articles, and, as with the Retail Clerks' proposals, the principal demands were for a union shop, an increase in wages, a seniority rule, and arbitration. At the November 12 meeting, each of the 14 articles was discussed, with Powell setting forth the respondent's position on each article. Not one met with his approval. The union's principal demands were rejected as being contrary to "company policy," which in effect meant the then existing practices of the respondent in regard to wages, seniority, hours, and working conditions, and its policy against any form of closed shop and any method of arbitration. Powell did indicate tentative acceptance of some articles of minor importance with certain modifications, particularly where the term as agreed to would not conflict with the status quo.

An example of the type of modification suggested by Powell is contained in Powell's written report to Barr of the meeting of November 12. Thus Powell reported:

Article 3. Section 1 (which provided that five 8-hour days between Monday and Friday should constitute a week's work)—We explained that we could not agree to Section 1 as it is worded. We stated that we could agree to a provision somewhat like this: no employee shall work less than four hours per day; no female employee shall work more than eight hours per day; the work week shall consist of 40 hours of work from Friday to Thursday inclusive excluding Sunday. This statement conforms to our present policy although we did not make the statement that this was our present policy. Mr. Estabrook suggested that we pass over that point for the present.

With regard to the proposals of the Warehousemen's contract that the respondent recognize the Warehousemen as the exclusive representative of the employees within the appropriate unit and that it agree not to discriminate against union members because of their affiliation, the respondent objected that such matters were covered by the Act and did not constitute questions upon which the parties were free to agree or disagree. Upon the Warehousemen's insistence that the recognition clause constituted an important part of the contract, the

respondent offered to include it as a "preliminary whereas clause."

The respondent claimed that its policy was to pay wages as high as or higher than those paid by competitors in the same area. Powell testified that prior to the negotiations he was assured by the personnel manager for the Portland store that the "company's wage policy was being followed." Accordingly, at the November 12 meeting Powell, in reply to the union's proposal for an increase in the scale of wages being paid to warehousemen, submitted a list containing the minimum rates of wages then being paid by the respondent to its warehousemen, and stated that no changes would be made in the existing rates. At this and other meetings, Estabrook disputed the respondent's contention that it was paying as high wages as its competitors.

Despite the fact that Barr had indicated approval of the Warehousemen's proposal that "If employees are worked over five (5) consecutive hours without a meal period, all time in excess of five (5) hours . . . shall be at the overtime rate," Powell took the position at the November 12 conference that "We had no objection to Article 7 providing the Union would agree to change the word 'five' to 'six' which is our present practice." Throughout the negotiations, Powell maintained this position and refused at all times to agree to the Warehousemen's proposal that employees working more than 5 consecutive hours without a meal period be paid at overtime rates.

Although in his discussion with the union, Powell had rejected the third sentence of Article XI discussed above, which provided that certain strikes should be excepted from the no-strike provision of the contract, in his report to Barr he indicated an intention to accede to the Warehousemen in this regard. Thus Powell reported the following:

Before the meeting Mr. Huddleston and I had decided that we could express our agreement with sentences Nos. 1 and 2 but that we would object to sentence No. 3. The conclusion we reached after the meeting was that unless we want to insist upon an unconditional agreement not to strike there will be no harm in agreeing to sentence No. 3 . . .

The discussion concerning counterproposals at the November 12 conference is described in Powell's letter of November 13 to Barr, as follows:

Also, Estabrook asked if we could, in the meantime, prepare a written statement of terms which would be agreeable to the Company. He expressed the belief that we were obligated to submit our position in writing. I answered that it would serve no purpose for us to submit written terms until he could assure us that those terms would be agreeable to the Union. Estabrook then said he did not know whether or not the terms would be agreeable. He said they would have to submit the terms to their membership to find out if the members would agree.

He then repeated his request that we prepare an agreement in writing which will be agreeable to us. He said then they would have something to submit at the meeting of the Union members. I again replied that I did not see any point in our submitting a written proposal until he could assure us definitely that the terms would be agreeable. The meeting then broke up with nothing further being said on this point.

That Powell was troubled about the reasonableness of the position he had taken is evident from the concluding remarks in his letter to Barr, as follows:

I would like to submit this for your consideration. Do you feel that our obligation to bargain in good faith requires that we submit the Company's position in writing? The question of reasonableness is involved here and I have not yet reached a conclusion in my own mind. There is some argument to the effect that if we will state verbally the terms which are agreeable to us we should have no objection to reducing those terms to writing. This seems to be in line with the Court decisions which require that an employer is obligated to sign an agreement where he has reached a verbal agreement with a Union. On the other hand it seems that we are perfectly within our rights to say that there is no reason to submit our terms in writing until we reach a meeting of the minds by verbal discussion. It does seem useless to pre-

sent our terms in writing when we are pretty sure they will not be accepted.

Another point to consider is the Union's statement that they want something in writing to submit to their membership and there is a question as to whether we are obligated to furnish a written statement of terms for that purpose.

As Estabrook will probably call me next week I will appreciate your comments as soon as possible.

The reply of Barr to Powell on November 22 is significant in that it contains the philosophy of the respondent on the subject of collective bargaining, which position it consistently maintained, as set forth below, throughout all its negotiations with the Unions herein:

To date, we have had no situation where we have sought a contract with a union. Therefore, by the very nature of the situation, the initiative lies with the union. We propose to fulfill our obligation to bargain with the unions in good faith, but this does not pass to us "the burden of going forward". The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our relative economic positions of such nature as to induce us to seek some concession from the union . . .

As Mr. Ball stated, we do not think that the

Act places upon an employer the absolute duty to make counterproposals. This does not mean, however, that we are to take an abnormal or unnatural attitude with regard to counterproposals. We should explain our position on any point being bargained when requested to do so, and in many instances this will, in substance include a counterproposal whether or not it is expressly so labeled . . . Mr. Ball did not mean that counterproposals in the broad sense, should never be made. He only meant that we should not take the initiative in the bargaining process.

To state in different words, we do not want you to feel under abnormal restraint in the statement of the Company's position . . . This is necessary to good faith and we should not be unduly concerned over whether or not our statement of position contains what might be considered a counterproposal. Just keep in mind, however, that it is the union, not the Company, which is seeking an agreement . . .

. . . I will close with a "recapitulation" of some of the high points.

1. The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing.

2. The union is seeking something from us. We are not to assume the initiative by volunteering proposals or counterproposals.

3. In discussing individual clauses state that

you have no present objection to clauses which are not objectionable, but do not "agree" to such clauses. You can only agree to a contract as a whole.

4. Insist on a "no-strike" clause without qualifications or exceptions.

5. Whenever in doubt as to what you should do resolve the doubt in favor of the Company. Err on the side of conservatism if you err at all.

6. Do not rush the bargaining process and do not yourself take the initiative in seeking an agreement.

7. Bargain in good faith. State the Company's position on the points raised honestly and frankly. Your statement of position may or may not contain what might be considered as a counterproposal.

8. Whether or not any agreement reached will be reduced to writing and signed can only be determined after an agreement is reached. Prior to that time a discussion of this point is premature.

You're doing a good job, Bill. Keep it up. Keep us advised of what you are doing and contact us immediately if something gets "hot".

Barr's instructions to "Insist on a 'no-strike' clause without qualifications or exceptions" constituted, it will be observed, a repudiation of his earlier instructions which authorized Powell to use his discretion in such matters, and only after

Powell had indicated that he intended to agree to Article XI of the Warehousemen's proposal which provided for certain exceptions to the no-strike clause.

On November 7, 1940, Thomas White, secretary-treasurer of the Western Warehouse Council which consisted of 58 local unions of warehousemen in the 11 Western States, wrote the respondent that it had "up to the present time refused to sign an agreement for the wages, hours and working conditions" of the Warehousemen in Portland, and threatened to take "economic action" unless "labor disputes with Mr. Jack Estabrook of Portland, Oregon," and other representatives of local unions in the Western establishments of the respondent were "settled to the satisfaction of our organizations."

Thereafter, White, Estabrook, and three representatives of the Retail Clerks met with the respondent in Oakland, California, on November 25, 1940. We credit Estabrook's uncontradicted testimony that at the November 25 meeting,

I made the statement, . . . that we tried to negotiate with Mr. Powell and Mr. Huddleston; . . . but we were not getting anywhere, and that we thought we were being stalled, that we had heard so much about company policy that we were getting tired of it, and we wanted to know what it was, if they had a book on company policy, and, if so, we would like to see it, . . . so that we would know better what

to do. They didn't seem to have a book, or seem to be able to furnish us with a book . . . Mr. White and myself volunteered to go to Chicago with Mr. Powell, if it was necessary, in order to negotiate our contract; we stated that we wanted to talk with the people that we were to negotiate with, and up until then we had not been able to . . . He [Powell] said that he would take that under advisement.

Part of the events of the November 25 meeting are described in the following excerpt from Powell's letter of November 26 to Barr:

He [White] wound up his speech with an ultimatum that unless the Company would agree to a union ship (sic) at Portland they were prepared to take joint action against the Company in the eleven Western States. Mr. Estabrook then suggested he would be glad to fly to Chicago to talk with you, if there were some possibility that our policy could be changed. At first they insisted we give them a reply within twenty-four hours, but later agreed to allow us until noon on Thursday, November 28. I will wait until Thursday morning at which time I will call Mr. White in San Francisco and explain that you will be glad to meet with union representatives in Chicago and listen to their argument, but I will not assure him that any change in policy is contemplated at the present time.

Thus it is to be observed that although the respondent had made its decision, as early as November 26, on the Union's suggestion that the negotiations be continued in Chicago, and although the respondent was fully aware of the Union's desire for an early reply, it deliberately delayed its reply to White until November 28.

On December 2, Dixon, the secretary-treasurer of the Retail Clerks, who was unable to attend the November 25 meeting, telephoned Barth, the manager of the respondent's retail store in Portland, and told him that "we were very anxious to bring about a settlement; that our people were getting very anxious; that they thought "that the company was stalling for time," and that the Retail Clerks was willing to withhold strike action if the respondent would arrange for a meeting with them. Barth replied that he would try to induce Powell to come to Portland. It appears that Dixon called Barth again on December 4 or 5 and told him that the strike of the Retail Clerks at Portland would be withheld until December 6 or 7, pending a meeting there between the Retail Clerks and responsible company officials. On December 4 the employees of the respondent's Oakland plant struck. Thereafter Powell remained in Oakland attempting to settle the strike there. On December 5 Barth telephoned Dixon in Portland and told him that he had spoken to Powell and that Powell had stated that negotiations were being carried on in Oakland in behalf of the Retail Clerks. Dixon replied that the

negotiations at Oakland concerned only the Oakland employees of the respondent and that he proposed to negotiate for the Portland employees at Portland. Dixon offered, however, to permit negotiations to be carried on at Oakland in behalf of the Portland employees if it were impossible for the respondent to send a representative to Portland. Hearing nothing further from the respondent on December 6, the members of the Retail Clerks unanimously voted to go on strike at Portland the next day, primarily because of their sentiment that the respondent had refused "to negotiate a contract at Portland." Immediately thereafter the Warehousemen declared a strike at Portland to support the Retail Clerks and because, according to Estabrook, whose testimony we credit, "the [Portland] membership got tired of Montgomery Ward stalling us around." On December 6, prior to the strike at Portland, White had assured Powell that since they were making progress in their Oakland negotiations he would see that no strike action was taken at Portland; but on the next day White informed Powell that he no longer had authority to act for the Retail Clerks at Portland "and that the action which had been taken was out of his control."

On December 13, 14, and 16, Frank Ashe, a conciliator of the United States Department of Labor, and representatives of the unions, including the Office Employees Union, which had joined in the strike at Portland, conferred jointly with the respondent in respect to the Portland employees.

During the December 13 conference, Powell was asked whether the respondent had any proposal to make. He replied "that our proposal or demand at present was that the picket lines be removed and that the employees be allowed to return to work." He added that the "Company had no other proposal to submit nor did the Company intend to make any other demands on the Union." Landye asked whether, if the Unions withdrew their request for a union shop, the respondent would be willing to submit to arbitration the question of what clauses should be included in the contract. The answer was in the negative. Landye then asked if the respondent would agree to the proposed contract submitted by the Warehousemen if the union shop clause were omitted. Powell stated that the respondent could not agree to the remainder of the proposal as it had substantial objections to certain provisions. According to Landye's uncontradicted testimony which we credit, he asked the respondent for a counterproposal on the contracts submitted by the Warehousemen, the Retail Clerks, and the Office Employees Union and that

I stated that I wanted the company to take each section of the union's contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract . . . Mr. Powell stated that the company was not asking anything from us, and that it was up to us to make proposals that would

please the company; and that he said his conception of negotiations was that the company had no affirmative duty to do anything, and that it was up to the union to please the company. And he stated that they wouldn't submit a counter proposal.

The meeting then broke up. That afternoon Ashe telephoned Powell and suggested another meeting for the following morning. Powell replied "that we [the respondent] had nothing further to submit but that if he [Ashe] felt a further meeting was advisable we would be glad to meet."

Accordingly, the three unions and the respondent met again the following day. Ashe opened the meeting by asking Powell if the respondent "had anything at all in the way of a proposal to submit which might provide a basis for an agreement." Powell replied that the respondent had nothing further to submit other than the statement of its position in regard to each one of the proposals theretofore submitted. Powell was then asked if the respondent would be willing to sign an agreement which merely set out its present policies and practices. According to his own report, Powell replied as follows:

I replied that the question of the form of agreement, that is, whether it should be verbal or written, is premature at this time. I suggested that if we could reach an agreement upon substantial provisions, then that question

should be considered. Allen then stated that if we could reach agreement would we be willing to sign it. I replied that possibly we would but that I thought a discussion of that question was premature.

Estabrook and Dixon then brought up the matter of wages and claimed that the respondent was not paying the prevailing wage. Powell disagreed. Estabrook then mentioned the names of several local concerns, stating that they were paying more for comparable work than the respondent. Estabrook testified that the discussion over wages "died down by the time that I offered to bet something that they paid less than the others."

In reply to Ashe's request that he be permitted to employ a stenographer to take notes on what transpired, the respondent stated that it "would object to such procedure" on the ground that it did not feel the presence of a stenographer would facilitate the discussion." Thereafter the meeting adjourned with the understanding that the parties would meet again on December 16.

At the conference on the 16th, attended by the three unions and the respondent, Estabrook suggested that they go over the Warehousemen's proposed contract article by article. Powell questioned the value of doing so unless the Warehousemen was willing to withdraw its demands in respect to a union shop, seniority, and arbitration. The unions replied that only the respective unions' members

had authority to withdraw the respective union demands, but upon Estabrook's statement that there was a possibility that the demand for a union shop would be withdrawn, they proceeded to discuss the entire contract proposed by the Warehousemen. A similar procedure was followed with respect to the proposed contracts of the Retail Clerks and the Office Employees Union. The respondent took the same position on the principal clauses in dispute, that is, as to a union shop, seniority, increases in wages, and arbitration, as it had done theretofore, although the Unions indicated their willingness to forego the arbitration clauses and receded in other respects from their original demands. The only concessions made by the respondent, with possibly three minor exceptions,¹⁰ were such as would not alter the status quo and conformed to its "policies." In discussing the Warehousemen's proposed agreement, the respondent maintained its earlier position that if the recognition clause "has any place in the agreement it should be

(10) These were all in regard to the Retail Clerks' proposed agreement. The respondent agreed to review regularly the records of all employees, to provide stock help for the women's coat and yardage and blanket departments, and to supply identical garb where required by the respondent. There was no showing whether or not the respondent's agreement to these matters in any way altered the status quo. In Powell's words, "There were not any concessions [on respondent's part] of major importance; there were, I would say, some minor concessions."

in a preliminary 'whereas' clause" and refused altogether to include in the contract a clause providing that the respondent would not discriminate against union members. Although Powell had previously informed Barr that "As a matter of fact we do have working Supervisors in the Portland Plant" and had offered to the Warehousemen at the November 12 conference to pay such working supervisors 3 cents per hour more than the employees under their supervision, Powell, at the conference on December 16, rejected the Warehousemen's proposal that working supervisors be paid 50 cents per day more than other employees, on the asserted ground that "we did not believe we employed persons such as those mentioned" and "we could not grant any concessions in the rate of pay of these people." At the close of the conference, Ashe stated that the clauses of the contracts to which the respondent objected primarily were those providing for any union shop, any increase in wages, a seniority rule, or any form of arbitration, and stated further: "We aren't getting any place; we might as well call it quits." The meeting then adjourned.

b. Concluding Findings

The issue to be determined is whether or not the respondent has fulfilled its duty to bargain collectively with the Unions as required by the Act. In general terms, the scope of that duty appears from our decision in *Matter of Singer Manufactur-*

ing Co. and United Electrical, Radio & Machine Workers of America, etc.,¹¹ wherein we held as follows:

Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement by the employer with the accredited representatives of its employees concerning wages, hours, and other conditions of employment. The duty to bargain collectively, which the Act imposes upon employers, has as its objective the establishment of such a contractual relationship to the end that employment relations may be stabilized and obstruction to the free flow of commerce thus prevented; and, indeed, the protection to organization of employees afforded by the first four subdivisions of Section 8 of the Act is intended to make possible and to implement the stabilization of working conditions through collective bargaining conducted between employers and the freely designated representatives of their employees as equals. The duty to bargain collectively is not limited to the recognition of the employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find

(11) 24 N.L.R.B., No. 41, enf'd as mod., *Singer Mfg. Co. v. N.L.R.B.*, 119 F. (2d) 131 (C.C.A. 7), cert. den., 61 S. Ct. 1119.

a basis of agreement concerning the issues presented,* and to make contractually binding the understanding upon the terms that are reached.** . . .

Under the Act, the respondent was obliged to bargain with the Unions as exclusive representatives of the employees in the appropriate units hereinabove found,¹² to embody understandings that might be reached with the unions in signed agreements,¹³ and to incorporate into the contracts, upon request, full recognition of the Unions, in express terms, as

*Manifestly, in exploring the possibilities of reaching an agreement the open and fair-mindedness and sincerity of purpose required by the Act contemplates an interchange of ideas, the communication of facts peculiarly within the knowledge of either party, personal persuasion, and willingness to modify demands in accordance with the total situation thus revealed. See *Matter of S. L. Allen & Company, Inc.*, a corporation and Federal Labor Union Local No. 18526, 1 N.L.R.B. 714 at page 728.

***Matter of St. Joseph Stockyards Company and Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 159*, 2 N. L. R. B. 39. We have reaffirmed this interpretation of the Act in all subsequent cases involving this question. See *Matter of Westinghouse Electric & Manufacturing Company and United Electrical, Radio and Machine Workers of America*, 22 N. L. R. B., 147, and cases cited in footnote 14, therein . . .

(12) *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

(13) *H. J. Heinz Co. v. N. L. R. B.* 311 U. S. 514.

exclusive bargaining agents.¹⁴ Moreover, the respondent, pursuant to its duty to bargain collectively in good faith, was required to take an active part in the negotiations to the end that agreement should be reached if possible.¹⁵ We are of the

(14) *McQuay-Norris Mfg. Co., v. N.L.R.B.*, 116 F. (2d) 748 (C.C.A. 7), cert. den., 61 S. Ct. 843, enf'g *Matter of McQuay-Norris Mfg. Co. and United Automobile Workers of America*, Local No. 226, 21 N. L. R. B. 709.

(15) Cf., for example, *N.L.R.B. v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (C. C. A. 1) cert. den., 61 S. Ct. 1119, where the Court stated:

The respondent . . . was legally bound to confer and negotiate sincerely with the representatives of its employees. It was required to do so with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation.

Similarly in *N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. (2d) 32 (C. C. A. 3) the Court stated:

Bargaining presupposes negotiations between parties carried on in good faith. The fair dealing which the service of good faith calls for must be exhibited by the parties in their approach and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation. For such purpose, there must be common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason. When the proffered support fails to persuade or if, for any cause, resistance to the claim remains, it is then that compromise comes into play. But, agreement by way of compromise cannot be ex-

opinion that the respondent failed in a number of respects to comply with its obligation to bargain collectively, as thus defined.

The respondent, although requested to do so, did not agree to embody understandings that might be reached with the Unions in signed contracts. Thus, at the meetings of September 19 and December 16,

pected unless the one rejecting a claim or demand is willing to make counter-suggestion or proposal. And, where that is expressly invited but is refused, in such circumstances the refusal may go to support a want of good faith and, hence, a refusal to bargain. The considerations are especially applicable to negotiations looking to collective bargaining and have been so regarded by the courts. [Citations omitted.]

In *N. L. R. B. v. Highland Park Mfg. Co.*, 110 F. (2d) 632 (C. C. A. 4), the Court stated:

The Act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible . . .

In *Globe Cotton Mills v. N. L. R. B.*, 103 F. (2d) 91 (C. C. A. 5), the Court stated:

. . . There is a duty on both sides . . . to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand out as a mutual guarantee of conduct, and as a guide for the adjustment of grievances.

In *N. L. R. B. v. The Boss Mfg. Co.*, 118 F. (2d) 187 (C. C. A. 7), the Court said:

Collective bargaining, as contemplated by the Act, is a procedure looking toward the making

Powell refused to agree to sign a written contract, stating that the respondent had never signed a contract with a labor organization and that while it "possibly" might sign a contract, "the question of the form of the agreement, that is, whether it should be oral or written is premature" until "we could reach an agreement upon substantial provisions." Far from being a mere formal part of the agree-

of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours and other conditions of employment. Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented. [Citations omitted.]

In *Singer Mfg. Co. v. N. L. R. B.*, 119 F. (2d) 131 (C. C. A. 7) cert. den., 61 S. Ct. 1119, the Court observed that the Act constitutes "remedial legislation," placing upon the employer

the duty, in the interest of public welfare, to enter into discussion with its employees with open and fair minds, with sincere purpose to find basis for agreement.

And in *Wilson & Co. v. N. L. R. B.*, 115 F. (2d) 759 (C. C. A. 8), the Court noted as a basis for sustaining the finding of the Board that the employer had not bargained collectively within the meaning of Section 8 (5),

That there was a lack of such cooperation between the management of petitioner and the representative of its employees in collective bargaining as would be likely to avoid future labor difficulties.

ment, the written contract constitutes the very object of collective bargaining, "the absence of which . . . tends to frustrate the end sought by collective bargaining."¹⁶ The refusal of the respondent to agree to grant the Unions the very object of collective bargaining was tantamount to a refusal to bargain altogether.¹⁷ We deem it immaterial in this connection that when the Unions requested signed contracts the parties had not yet reached complete understanding as to what would be included in the contracts¹⁸ and that although the respondent did not agree to reduce understandings to a signed contract, the Unions nevertheless discussed with the respondent proposed wages, hours, and other conditions of employment.¹⁹

(16) *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514.

(17) *Ibid.*

(18) *Cf. N. L. R. B. v. Highland Park Mfg. Co.*, 110 F. (2d) 632 (C. C. A. 4); *N. L. R. B. v. Wilson & Co.*, 115 F. (2d) 759 (C. C. A. 8). In the latter case the Court stated the following: ". . . We do not believe that negotiations which are carried on without any intention of reaching a definite agreement or of reducing to writing any agreement that may be reached, constitute a full compliance with the Act."

(19) *Cf. McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. (2d) 748 (C. C. A. 7), cert. den. 61 S. Ct. 843. The Court, in overruling a similar defense, stated the following: ". . . There could be no genuine bargaining as contemplated by the Statute until complete recognition had been granted as the Act requested . . . [The employer's bargaining with the Union], while limiting its recognition solely to members of the Union, made such bargaining abortive and of little, if any, effect."

Furthermore, at the November 12 and December 16 meetings, the respondent refused to agree to a clause of the Warehousemen's proposed contract by which the respondent promised to recognize it as exclusive representative, on the asserted ground that recognition was a question of fact which neither the Union nor the respondent was free to agree upon. It is true that the respondent offered to include a recognition clause as a "preliminary whereas clause." In our opinion, however, this does not satisfy the respondent's obligation to "bind itself to give exclusive recognition" to the Warehousemen.²⁰ The respondent, again asserting that the matter was "covered by law and is not a subject of agreement," refused at these meetings to insert in the contract with the Warehousemen a clause by which the respondent promised not to discriminate because of union membership. But as Ashe, the Department of Labor Conciliator, pointed out, the only explanation for the respondent's refusal to agree to include this clause in the contract was that it "merely did not want to give the Union the satisfaction of having it there." The Circuit Court of Appeals for the Eighth Circuit pointed out in the *Wilson* case,²¹ that "A refusal to do what reasonable and fair-minded men are ordinarily willing to do, upon re-

(20) *Matter of McQuay-Norris Mfg. Co. and United Automobile Workers of America, Local No. 226*, 21 N. L. R. B. 709, enf'd National Labor Relations Board v. McQuay-Norris Mfg. Co., *ibid*.

(21) See *supra*, footnote 18.

quest, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining." Clauses prohibiting discrimination because of union affiliation are frequently sought by labor organizations to give to the employees a feeling of security in the exercise of the rights guaranteed in the Act,²² and such clauses are not uncommonly embodied in collective bargaining contracts. Upon the entire record, we find that the respondent, without cause, refused upon request to embody the prohibition against union discrimination in a contract, and that the respondent, by this "refusal to do what reasonable and fair-minded men are ordinarily willing to do," demonstrated its refusal to bargain collectively in good faith.

The respondent's declarations abundantly disclose an attitude inconsistent with its obligation actively to cooperate with the Unions and to endeavor to reach understandings with them. As Barr, speaking for the respondent, told its agent, Powell: "... It is the union, not the Company which is seeking an agreement." Accordingly, Powell told the Unions at the December 13 conference that "his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company." Similarly, the re-

(22) See, for example, *Matter of Singer Mfg. Co. and United Electrical, Radio and Machine Workers of America, etc.*, 24 N. L. R. B., No. 41, enf'd as mod., *Singer Mfg. Co. v. National Labor Relations Board*, *supra*, footnote 15.

spondent in its brief, states that "the duty to bargain is no more . . . than the duty to meet the employee representative and do . . . or say nothing which would make a binding trade agreement impossible of attainment." It takes the affirmative efforts of the two parties, however, to make a collective bargain. The Board and court decisions hereinabove cited clearly establish that the respondent by its negative attitude was refusing to bargain collectively in good faith.

Pursuant to its hypertechnical approach, the respondent was willing to meet with the Unions when requested, listen to their demands, and explain its position thereon. Further than this the respondent refused to go and it persisted, rather, in the view that the obligation of taking further steps rested upon the Unions alone. Thus, the respondent was opposed to submitting to the Unions genuine counterproposals. It is true that Barr, assertedly, did not object to the respondent's explanation of its position "on any point being bargained when requested to do so" even if such explanation did "in substance include a counterproposal." Nevertheless, the respondent objected to taking "the initiative in the bargaining process"; that is, objected to formulating proposed conditions of employment affirmatively, as counterproposals to union demands. That the respondent was opposed to affirmative efforts on its part to find a basis for agreement by means of counterproposals appears also from Barr's statements that

the respondent had at no time sought a contract with a union and that

Therefore, by the very nature of the situation, the initiative lies with the union. We propose to fill our obligation to bargain with the Unions in good faith, but this does not pass to us "the burden of going forward". The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our relative economic positions of such nature as to induce us to seek some concession from the union . . .

As Mr. Ball stated, we do not think that the Act places upon an employer the absolute duty to make counterproposals . . .

The respondent was at no point willing to assume "the burden of going forward" in the negotiations and was thus unwilling, without reason, to cooperate with the Unions in bringing the collective bargaining negotiations to a successful conclusion. Thus, at the November 12 conference, after the respondent had rejected the Warehousemen's written proposals, the Warehousemen asked the respondent for a written statement of terms which would be agreeable to the respondent. The respondent rejected this request on the asserted ground that written terms would serve no purpose unless the respondent were assured in advance that those terms would be agree-

able to the Union. Although Estabrook, in behalf of the Warehousemen, explained that the union membership would have to pass upon the terms and that written company counterproposals would facilitate submission of the problem to the union membership, the respondent again rejected the request on the specious ground that the terms would have to be acceptable to the Union before the respondent would submit them in writing. Again, at the December 13 conference, the Unions requested and were refused counterproposals. Moreover, in response to the Union's suggestion at that conference that the respondent "take each section of the unions' contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract . . ." the respondent replied that it was not asking anything of the Unions and that it was up to them to make proposals that would "please the company." The respondent has offered no explanation for its refusal to submit counterproposals or written countersuggestions. We are of the opinion, and find, that the respondent's attitude and conduct with respect to the union requests for counterproposals evidence "a want of good faith and, hence, a refusal to bargain."²³

Also illustrative of the respondent's bad faith in the negotiations is its repeated rejection of union

(23) See the Pilling case, *supra*, footnote 15; also *Globe Cotton Mills v. National Labor Relations Board*, 103 F. (2d) 91 (C. C. A. 5).

proposals on the general ground that they were not consonant with company policy or practice. We are satisfied upon this record that the respondent, in thus relying simply on existing practice as a reason for not agreeing to union proposals, failed to fulfill its obligation "to discuss freely and fully their [the parties'] respective claims and demands and, when these are opposed, to justify them on reason."²⁴

Other conduct of the respondent furnishes further evidence of its refusal to bargain collectively in good faith. It will be recalled that although the respondent was fully aware of the Unions' desire for an early reply to their suggestion at the November 25 meeting that a further conference take place at Chicago, and although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28. The respondent's inconsistent behavior is also relevant in this connection. For example, although Barr, whose instructions Powell ordinarily followed, indicated that he had no objection to the Warehousemen's proposal that employees working more than 5 hours without a meal period be paid at

(24) See the Pilling case, *supra*, footnote 15; cf. the definition of collective bargaining advanced by the National Mediation Board, 8 L. R. R., No. 24, p. 827, 831: "successful negotiations must necessarily be on the basis of mutual consideration of the merits of the arguments presented by the respective parties."

overtime rates, Powell at all times insisted that the respondent's past policy of not paying overtime for less than 6 consecutive hours' work be followed. Similarly, when Powell indicated to Barr that he might acquiesce in certain exceptions to the proposal forbidding strikes during the contract period, Barr repudiated his prior instructions to Powell to use his own discretion in such matters, and ordered him to "insist on a 'no-strike' clause without qualifications or exceptions." Again, Powell stated to the Unions at the December 16 meeting, in response to a proposal concerning working supervisors, that "we did not believe we employed persons such as those mentioned"; yet he had already acknowledged to Barr that "as a matter of fact we do have working Supervisors in the Portland plant."

Finally, the respondent, as noted below, solicited the individual striking employees to return to work in violation of Section 8 (1) of the Act. The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees in the appropriate units herein found and such conduct reflects on its good faith in the collective bargaining negotiations.²⁵

(25) *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), cert. den. 304 U. S. 576; *The M. H. Ritzwoller Company v. National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7), enf'g as modified *Matter of The M. H. Ritzwoller Company and Coopers International Union of North America, Local No. 28*, 15 N.L.R.B. 15; *National Labor Relations Board v. Lightner*

Barr's instructions to Powell and the respondent's actions disclose that the respondent, while going through the motions of meeting and conferring with the Unions, was not in fact bargaining collectively. Reviewing the whole congeries of events, we find that the respondent did not, as it was bound to do, "confer and negotiate sincerely with the representatives of its employees . . . with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation."²⁶

As above noted, the Unions on December 7 declared a strike at the Portland plant. The strike was still in effect at the time of the hearing. A substantial cause of the strike and its prolongation was the justified feeling of the Unions that the respondent was "stalling"; that is, not fulfilling its obligation to bargain collectively as required by the Act.

We find that on September 19, 1940, and at all times thereafter, the respondent has refused to bargain with the Retail Clerks and the Warehousemen as the exclusive representatives of its employees in appropriate units with respect to rates of pay, wages, hours of employment, and other conditions

Publishing Corp. of Illinois, 113 F. (2d) 621 (C. C. A. 7), enf'g as mod. Matter of Lightner Publishing Corporation of Illinois and Chicago Printing Pressmen's Union No. 3, Chicago Typographical Union No. 16, 12 N. L. R. B. 1255; Matter of Manville Jenckes Corporation and Woonsocket Rayon Company and Independent Textile Union of America, 30 N. L. R. B., No. 60.

(26) See the Reed & Prince case, *supra*, footnote 15.

of employment, and that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. We find further that the respondent's refusals to bargain caused and prolonged the strike at Portland, which began on December 7, 1940.

B. Interference, restraint, and coercion

On Sunday, December 8, 1940, the day following the commencement of the strike at Portland, Robinson, superintendent of operations of the mail-order house, called a meeting of the operating superintendents of each floor, handed them a list of the names and telephone numbers of employees who worked under them, and instructed them to transmit to those employees a message as follows:

Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in.

(When you have made the above statement, listen for the employee's reaction to it. Do not make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not in any insist that the employee should come to work or intimate that

their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come in.)

From the testimony of W. A. McGowan, operating superintendent of the fifth floor of the mail-order house, it is evident that the above message was delivered to the employees by the respondent's supervisory employees. However, the testimony of three employees, who worked under McGowan, and who did not report for work on December 7, of how McGowan attempted to procure their return to work shows that he went beyond these instructions. Helen Blackburn testified that on the evening of the day the strike was called²⁷ she telephoned McGowan to tell him that she had not been to work that day because she did not want to cross the picket line and that McGowan replied, "that I didn't have to go through the picket line, that I could go through the back way. . . . He said for me to tell the kids that if they weren't there on Monday morning, (December 9), he was going to reinstate [sic] them with new employees."

Robert Fullerton testified that one evening, about the middle of the week following the strike, Mc-

(27) Either McGowan must have received his instructions the day of the strike or this call must have been made on the day following the strike, because Mrs. Blackburn testified that she did her telephoning after she had received a call that the store would be open for operations Monday morning.

Gowan and his wife visited his home for the first time and McGowan stated that "he was just making a friendly call . . . coming around to each and every one that he figured he could trust . . . in order to get them back to work, and to tell them that if they were not there by a certain date, they would have to have their jobs refilled." According to Fullerton, McGowan informed him during the conversation that the respondent "would never go union, that if it did, they would lock the door."

William E. Hough testified that during the first week of the strike he learned that in his absence McGowan had visited his home. He decided to repay the call. According to Hough, McGowan told him—

. . . if I wanted to come back to work that I didn't have to really go through the picket line. I could come around through the back way of the store . . . He said he hated to see me out; . . . he didn't want to see me lose money . . . He said that the store would never go union; that they would lock the store up and send all the books and everything to the Chicago house before they would sign a union contract . . . He told us about Beede and Jack Walker,—those are the two boys working on our floor,—coming around through the back entrance . . . And before I left, he said he would like to have me get hold of as many fellows as I could and talk to them and tell them they could come in the back door . . .

McGowan denied having any telephone conversation with Blackburn, and in effect, denied the aforementioned testimony of Fullerton and Hough. Present at McGowan's home the evening that Hough paid his visit was another employee by the name of John B. Long, who wanted McGowan's advise as to whether to return to work. Long did return to work on December 17, and was in the employment of the respondent at the time he testified in its behalf. Long corroborated the testimony of McGowan as to what had occurred at the latter's home. In his Intermediate Report the Trial Examiner states that he "carefully observed the demeanor of the aforesaid witnesses and was more favorably impressed by Blackburn, Fullerton and Hough than by McGowan and Long." Furthermore, analysis of the testimony of both McGowan and Long reveals certain admissions indicating the substantial accuracy of the testimony of Fullerton and Hough. While McGowan insisted that he told both Hough and Long that he could not advise them as to whether or not they should return to work, nevertheless, he admitted that they did discuss——

about going through the picket line . . . I know that I brought it out in this respect, that Jack Walker and a few of the boys were driving into the parking lot and coming to the plant that way. I personally said that I wouldn't go that way; that I would walk up the ramp to the second floor.

Although McGowan testified that his suggested method meant going through the picket line, it is clear that McGowan was attempting to persuade both employees to return to work. While denying that he made any statement that the respondent "would never go union," McGowan admitted having stated that the respondent would not agree to a closed shop. While claiming that McGowan merely stated that the respondent would not agree to a closed shop, the respondent's witness Long admitted that the statement was made in reply to a question of whether the store "would ever go union." Upon the entire record, we credit the testimony of Blackburn, Fullerton, and Hough as being in substantial accord with the facts, as did the Trial Examiner.

Despite its instructions not to "in any way insist that the employee should come to work or intimate that their jobs will be in danger," the respondent is clearly responsible for McGowan's coercive statements to Blackburn, Fullerton, and Hough.²⁸ Moreover the respondent offered no evidence to show

(28) *International Association of Machinists v. National Labor Relations Board*, 61 S. Ct. 83, aff'g 110 F. (2d) 29 (App. D. C.), enf'g *Matter of The Serrick Corporation and International Union, United Automobile Workers of America, Local No. 459*, 8 N. L. R. B. 621; *H. J. Heinz Co. v. National Labor Relations Board*, 61 S. Ct. 320, aff'g 110 F. (2d) 843 (C. C. A. 6), enf'g *Matter of H. J. Heinz Company and Canning and Pickle Workers, Local No. 325*, affiliated with *Amalgamated Meat Cutters and Butcher Workmen of America, American Federation of Labor*, 10 N. L. R. B. 963.

that any of its employees were under any misapprehension that the respondent was not operating or that their jobs were not open for them if they wanted to work. Further, as we have found above, the strike was caused by the respondent's unlawful refusal to bargain collectively. Under these circumstances and upon the entire record, we find that the respondent, by communicating with the employees directly through its supervisory employees, and by stating to the employees that "we are operating tomorrow as usual and your job is open for you if you want to come in," was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity. We find that by such solicitation and by undercutting in this manner the authority of the Unions to act as the exclusive bargaining agents of the employees in the appropriate units,²⁹ as well as by McGowan's statements to Blackburn, Fullerton, and Hough, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the

(29) See footnote 25, *supra*.

several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the respondent has engaged in unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act and to restore as nearly as possible the conditions which existed prior to the commission of the unfair labor practices.

Having found that the respondent has refused to bargain collectively with the Retail Clerks and the Warehousemen, we shall order that the respondent, upon request, bargain collectively with the Unions and, if understandings are reached, embody such understandings in signed agreements.

We have found that the unfair labor practices of the respondent caused and prolonged the strike which began on December 7, 1940. In order to restore the status quo as existed prior to the time the respondent committed the unfair labor practices, we shall order the respondent (1) to offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to those employees who went on strike on December 7, 1940, or thereafter, and who have applied for and have not been offered reinstatement, and (2) upon application to offer reinstatement to their former or substantially equiv-

alent positions, without prejudice to their seniority and other rights and privileges, to those employees who went on strike on said date, or thereafter, and who have not previously applied for reinstatement; dismissing if necessary any persons hired by the respondent after December 7, 1940, the date of the strike, and not in the employ of the respondent on said date. If thereupon, because of a reduction in force, there is not sufficient employment available for the employees to be offered reinstatement, all available positions shall be distributed among all employees, without discrimination against any employee because of his union affiliation or activities, following such a system of seniority or other non-discriminatory practice to such extent as has heretofore been applied in the conduct of the respondent's business. Those employees, if any, remaining after such distribution, for whom no employment is immediately available, shall be placed upon a preferential list and offered employment in their former or substantially equivalent positions as such employment becomes **available and** before other persons are hired for such work, in the order determined among them by such system of seniority or other non-discriminatory practice as has heretofore been followed by the respondent.

We shall order the respondent to make whole those employees who went on strike December 7, 1940, or thereafter, and who have applied for and have not been offered reinstatement, for any loss of pay they may have suffered by reason of the

respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applied for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings,³⁰ if any, during such period. We shall also order the respondent to make whole those employees who went out on strike on December 7, 1940, or thereafter, and who have not previously applied for reinstatement for any loss of pay they may suffer by reason of the respondent's refusal, if any, to reinstate them, as provided above, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applied for reinstatement to the date of the

(30) By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for the respondent's discrimination against him and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.* 311 U.S. 7.

respondent's offer of reinstatement or placement on a preferential list, less his net earnings, if any, during such period.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and Retail Clerks' International Protective Association, Local No. 1257, both affiliated with the American Federation of Labor, are labor organizations, within the meaning of Section 2 (5) of the Act.

2. All merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers in the packing and billing department; all employees of the package-opening department except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies, all employees who handle merchandise in the operating auditing, stock-control, and catalog-service departments; all porters; and all

employees at the warehouse, excluding supervisory employees, have at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, is and at all times since August 10, 1940, has been the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. All retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees, have at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

5. Retail Clerks' International Protective Association, Local No. 1257, is and at all times since August 6, 1940, has been the exclusive representative of all the employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. By refusing to bargain collectively with Warehousemen's Union Local No. 206, chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and Retail Clerks' International Protective Association,

Local No. 1257, respectively, as the exclusive representatives of its employees in the respective appropriate units, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

8. The aforesaid labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Montgomery Ward & Company, Portland, Oregon, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, as the exclusive representative of all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight

elevators; all sorters, completers, and packers, but not billers in the packing and billing department; all employees of the package-opening department except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division except time-keepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock-control, and catalog-service departments; all porters; and all employees at the warehouse, excluding supervisory employees;

(b) Refusing to bargain collectively with Retail Clerks' International Protective Association, Local No. 1257, as the exclusive representative of all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to those employees who went on strike on December 7, 1940, or thereafter, and who have applied for and have not been offered reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the section entitled "The Remedy" above; and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(b) Upon application offer to those employees who went on strike on December 7, 1940, or thereafter, and who have not previously applied for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the section entitled "The Remedy" above; and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(c) Make whole the employees specified in paragraph 2 (a) above, for any loss of pay they may have suffered by reason of the respondent's refusal, if any, to reinstate them, by payment to each of

them of a sum of money equal to that which he would normally have earned as wages, during the period from five (5) days after the date on which he applied for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(d) Make whole the employees specified in paragraph 2 (b) above, for any loss of pay they may suffer by reason of the respondent's refusal, if any, to reinstate them pursuant to paragraph 2 (b) above, by payment to each of them of a sum of money equal to that which he would normally have earned as wages, during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(e) Upon request, bargain collectively with Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, as the exclusive representative of all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers in the packing and billing department; all employees in the package-opening department except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit en-

gaged in handling merchandise, except watch-makers; all employees in the merchandise division except timekeepers and employees engaged in taking orders; all employees in the supply and multi-graph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock-control, and catalog-service departments; all porters; and all employees at the warehouse, excluding supervisory employees, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached on any such matters, upon request embody such understanding in a signed agreement;

(f) Upon request, bargain collectively with Retail Clerks' International Protective Association, Local No. 1257, as the exclusive representative of all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached on any such matters, upon request embody such understanding in a signed agreement;

(g) Post immediately in conspicuous places in its Portland, Oregon, plant, and maintain for a period of not less than sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in

the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), (c), (d), (e), and (f) of this Order;

(h) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 29 day of November 1941.

(Seal)

HARRY A. MILLIS

Chairman

WM. M. LEISERSON

Member

NATIONAL LABOR RELATIONS
BOARD

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10108

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONTGOMERY WARD & COMPANY,
Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. §151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, Montgomery Ward & Company, Portland, Oregon, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Montgomery Ward & Company and Warehousemen's Union, Local No. 206, Chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Affiliated with the American Federation of Labor, Case No. C-1905," and "In the Matter of Montgomery Ward & Company and Retail Clerks' International Pro-

pective Association, Local No. 1257, Affiliated with the American Federation of Labor, Case No. C-1906.”

In support of this petition, the Board respectfully shows:

(1) Respondent is an Illinois corporation, engaged in business in the State of Oregon, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, decision and direction of election, certification of representatives, order of consolidation, consolidated complaint and notice of hearing, respondent's answer to the consolidated complaint, hearing for the purpose of taking testimony and receiving other evidence, intermediate report, respondent's exceptions thereto, and order transferring case to the Board, the Board, on November 29, 1941, duly stated its findings of fact, conclusions of law and issued an order directed to the respondent and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Sec-

tion 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Montgomery Ward & Company, Portland, Oregon, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, as the exclusive representative of all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers in the packing and billing department; all employees of the package-opening department except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock-control, and catalog-service departments; all porters; and all employees at the warehouse, excluding supervisory employees;

(b) Refusing to bargain collectively with Retail Clerks' International Protective Association, Local No. 1257, as the exclusive representative of all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to those employees who went on strike on December 7, 1940, or thereafter, and who have applied for and have not been offered reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the section entitled "The Remedy" above; and place those employees for whom

employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(b) Upon application offer to those employees who went on strike on December 7, 1940, or thereafter, and who have not previously applied for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the section entitled "The Remedy" above; and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner offer them employment as it becomes available;

(c) Make whole the employees specified in paragraph 2 (a) above, for any loss of pay they may have suffered by reason of the respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages, during the period from five (5) days after the date on which he applied for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(d) Make whole the employees specified in paragraph 2 (b) above, for any loss of pay they may suffer by reason of the respondent's refusal, if any to reinstate them pursuant to paragraph 2 (b) above, by payment to each of them of a sum of money equal to that which he would normally have earned as wages, during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(e) Upon request, bargain collectively with Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, as the exclusive representative of all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers in the packing and billing department; all employees in the package-opening department except authenticators; all employees of the central-repair unit except those engaged in office work; all employees in the jewelry-repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division except timekeepers and employees engaged in taking orders; all employees in the

supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock-control, and catalog-service departments; all porters; and all employees at the warehouse, excluding supervisory employees, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached on any such matters, upon request embody such understanding in a signed agreement;

(f) Upon request, bargain collectively with Retail Clerks' International Protective Association, Local No. 1257, as the exclusive representative of all retail clerks engaged in handling or selling merchandise, including display helpers, tire mounters, stock men, order fillers, markers, messengers, outside salesmen, and floor cashiers, exclusive of supervisory employees, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached on any such matters, upon request embody such understanding in a signed agreement;

(g) Post immediately in conspicuous places in its Portland, Oregon, plant, and maintain for a period of not less than sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent

will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), (c), (d), (e) and (f) of this Order;

(b) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

(3) On November 29, 1941, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Stuart S. Ball, Esquire, respondent's attorney in Evanston, Illinois.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript, and the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in

whole said order of the Board and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS
BOARD,

By ERNEST A. GROSS,
Associate General Counsel.

Dated at Washington, D. C., this 31st day of March, 1942.

District of Columbia—ss.

Ernest A. Gross, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

ERNEST A. GROSS,
Associate General Counsel.

Subscribed and sworn to before me this 31st day of March 1942.

(Seal) DANIEL T. GHENT, Jr.,
Notary Public, District of Columbia.

My Commission expires August 31, 1944.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT AND RULE TO SHOW CAUSE.

Comes now Montgomery Ward & Co., Incorporated, the respondent herein, and files its answer to the petition for enforcement filed by the National Labor Relations Board as follows:

1. The respondent admits the allegations of paragraphs (1), (3), and (4) of the petition for enforcement.

2. The respondent admits that the Board stated its findings of fact, conclusions of law and issued an order directed to the respondent, as set out in paragraph (2) of the petition for enforcement, but denies that said findings of fact are supported by evidence and states further that said conclusions of law and said order are erroneous, unauthorized and insufficient in law, and should be reviewed and set aside.

Wherefore, having answered each and every allegation contained in the petition for enforcement, the respondent prays this Honorable Court that said petition for enforcement be denied.

Dated this eleventh (11th) day of April, 1942.

MONTGOMERY WARD & CO.,
INCORPORATED,
STUART S. BALL,
Secretary.

State of Illinois

County of Cook—ss.

Stuart S. Ball, being first duly sworn, deposes and says that he is Secretary of Montgomery Ward & Co., Incorporated, respondent before the National Labor Relations Board in the foregoing matter; that he has read the foregoing answer and knows the contents thereof and that the same is true; and that he subscribed said answer in his capacity as Secretary of Montgomery Ward & Co., Incorporated, being thereunto duly authorized.

STUART S. BALL.

Subscribed and sworn to before me this 11 day of April, 1942.

(Seal)

LORETTA G. HALLIHAN,

Notary Public,

Cook County, Ills.

My Commission Expires Dec. 27, 1944.

[Endorsed]: Filed Apr. 13, 1942. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10108

NATIONAL LABOR RELATIONS BOARD,
Petitioner and
Cross-Respondent,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent and
Cross-Petitioner.

CROSS PETITION FOR REVIEW AND TO
SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Your cross-petitioner, Montgomery Ward & Co., Incorporated, respectfully represents:

1. That it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and that it is now, and at all times hereafter mentioned has been transacting business in the City of Portland, County of Multnomah, State of Oregon, all within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

2. That on or about March 31, 1941, the cross-respondent, National Labor Relations Board, issued, filed, and served it complaint against your cross-petitioner charging it with having engaged in and

engaging in unfair labor practices within the meaning of Section 8, Subdivisions 1 and 5, of the National Labor Relations Act, an Act of Congress approved July 5, 1935 (49 Stat. 449-497; 29 U. S. C. Sections 151-166), in the course of its business at Portland, Oregon.

3. That on or about November 29, 1941, the cross-respondent, National Labor Relations Board, made, filed, and served its Order on the cross-petitioner in said proceeding, which Order is the final Order of the National Labor Relations Board.

4. That cross-respondent's final Order is erroneous, unauthorized and insufficient in law, and should be reviewed and set aside because of each and all of the errors assigned in cross-petitioner's Statement of Points attached to and made a part of this Cross-Petition.

5. That your Cross-petitioner is aggrieved by Cross-respondent's final Order and brings this, its Cross-Petition for Review and to Set Aside an Order, pursuant to Section 10, Sub-division (f) of the National Labor Relations Act, an Act of Congress approved July 5, 1935 (49 Stat. 449-497 29 U. S. C. Sections 151-166).

6. Wherefore, your Cross-petitioner prays that this Honorable Court exercise its jurisdiction over the parties and subject matter of this Cross-petition and review the findings of fact, the conclusions of law and the final Order of Cross-respondent in this cause and enter a decree setting aside said Order, and that this Honorable Court make such other and

further orders and decrees as may be just and proper.

Dated this eleventh (11th) day of April, 1942.

MONTGOMERY WARD & CO.,
INCORPORATED,
STUART S. BALL,
Secretary.

State of Illinois,
County of Cook—ss.

Stuart S. Ball, being first duly sworn, deposes and says that he is Secretary of Montgomery Ward & Co., Incorporated, respondent before the National Labor Relations Board in the foregoing matter; that he has read the foregoing petition and knows the contents thereof and that the same is true; and that he subscribed said petition in his capacity as Secretary of Montgomery Ward & Co., Incorporated being thereunto duly authorized.

STUART S. BALL.

Subscribed and sworn to before me this 11 day of April, 1942.

(Seal)

LORETTA G. HALLIHAN,
Notary Public,
Cook County, Ills.

My Commission Expires Dec. 27, 1944.

United States of America
Before the National Labor Relations Board
Nineteenth Region.
Case No. XIX-C-847

In the Matter of MONTGOMERY WARD & COMPANY and WAREHOUSEMEN'S UNION, LOCAL No. 206, CHARTERED BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, Affiliated with the American Federation of Labor.

Case No. XIX-C-851

In the Matter of MONTGOMERY WARD & COMPANY and RETAIL CLERKS' INTERNATIONAL PROTECTIVE ASSOCIATION, LOCAL No. 1257, Affiliated with the American Federation of Labor.

TESTIMONY

New United States Court House
U. S. Circuit Court of Appeals Court Room
Portland, Oregon
April 14, 1941

The above-entitled matter came on for hearing at 10:00 a.m. pursuant to notice, as follows:

Before: George Bokar, Trial Examiner. [1*]

*Page numbering appearing at top of page of original Reporter's Transcript.

Appearances:

Patrick H. Walker, New United States Court House Building, Seattle, Washington, representing the Nineteenth Region.

Stewart S. Ball, 729 Central West Avenue, Evanston, Illinois, representing Montgomery Ward & Company, respondents.

James Landye, 1003 Corbett Building, Portland, Oregon, representing the charging unions. [2]

Proceedings

Trial Examiner Bokat: The hearing will please come to order. This is a formal hearing in the matter of Montgomery Ward & Company and Warehousemen Union, Local 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Affiliated with the A. F. of L., and Retail Clerks International Protective Association, Local Union No. 1257, affiliated with the A. F. of L., and known as causes, respectively, XIX-C-847 and XIX-C-851, before the National Labor Relations Board.

If counsel have not already stated their appearances for the record, they may do so now.

Mr. Ball: Stewart Ball, for the respondent, Montgomery Ward & Company.

Mr. Walker: Patrick H. Walker, for the Board.

Mr. Landye: James Landye, appearing for both the unions.

Mr. Ball: Let the record show that the respondent objects to an appearance in case No. XIX-C-847 and case No. XIX-C-851 by a representative or counsel for the charging unions, for the reason that the Board is fully represented by its own counsel; that this case involves charges against the respondent which, if true, are a violation of the law, and the respondent would be denied due process of law if its witnesses were subjected to double examination, by both counsel for the Board and counsel for the charging unions. [5]

Trial Examiner Bokat: Mr. Ball, I will have to overrule the objection for the reason that the rules and regulations make unions, parties to the proceedings, and, as parties, they have the right to be represented by counsel. The other part of your objection is rather premature. I don't know what part Mr. Landye will take in the proceedings, or whether he will cross examine any witnesses. I will defer ruling until we reach that,—that is, on that point.

I wish to inform all the parties that the official reporter makes the only official transcript of these proceedings. Citations in briefs or arguments based upon the record, directed to the Trial Examiner or to the Board, must cite the official transcript in all references to the record. The Board *will not* any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing and, if so, the party desiring the correction will submit the suggested

correction to the other party or parties in writing. When this has received the written approval of the other parties, it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon proposed corrections, the trial examiner will then consider motions to correct the record or may, upon his own motion, order certain corrections made in the transcript. If the parties have been unable to agree upon such corrections before the close of the [6] hearing, but have entered into a stipulation concerning such matters after the close of the hearing but prior to the receipt of the intermediate report, such stipulations or motions with respect to corrections in the transcript or record should be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington. After receipt of the intermediate report, all such communications should be directed to the Board itself, inasmuch as the Trial Examiner's connection with the case ceases upon the filing of his intermediate report with the regional director, at which time the Board transfers the case to itself.

This is a formal hearing and I request that you maintain the decorum that accompanies judicial proceedings.

Concise statements of reasons for motions or objections will be permitted. Arguments with respect to the same will not ordinarily appear in the official transcript. If counsel desire to argue objections, they will please so indicate to the Trial Examiner, who may, if he deems argument necessary, go "off

the record" for the purpose of hearing such argument.

It is to be understood that the official reporter takes everything that is said during the hearing by counsel, witnesses and the Trial Examiner, unless the Trial Examiner orders an off-the record discussion.

All requests from counsel to go off the record are to be directed to the Trial Examiner and not to the official reporter. [7]

The Trial Examiner will allow an automatic exception to all adverse rulings during the course of the hearing, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner.

At the close of the hearing, the parties may, if they so desire, argue orally before the Trial Examiner.

Similarly, they may file briefs with the Trial Examiner within a time to be stated at the close of the hearing.

Such briefs shall be directed to the Trial Examiner, in care of the Chief Trial Examiner in Washington.

I make this announcement at this time in order that the parties may plan their case and time schedule accordingly. [8-9]

I want to add to that, that any party may file a brief with the Board, after it is ordered trans-

ferred to the Board, in the event that happens, pursuant to Section 32 of the rules.

I have not seen the pleadings in these cases, nor have I acquainted myself with the issues; so, in order to acquaint myself with the issues I will declare a recess of fifteen minutes, at which time I will study the pleadings. There will be a recess declared at this time.

(Whereupon a short recess was had in the hearing.)

Trial Examiner Bokat: The hearing will come to order, please. You may proceed whenever you are ready, Mr. Walker.

Mr. Walker: May it please the Examiner, I offer in evidence what has been marked as Board's Exhibit No. 1, being the formal file, which consists of the original charge filed in case No. XIX-C-851, as the original charge filed in case No. XIX-C-847, the order consolidating the cases, the original notice of hearing, the original consolidated complaint, affidavit of service of the same, answer of the respondent, and a copy of the rules and regulations, Series 2, as amended, effective March 13, 1940, published by the National Labor Relations Board. May I point out that the order designating the Trial Examiner has not yet been received, and I request that the same may be made a part of Board's Exhibit No. 1 when received.

Trial Examiner Bokat: I presume there is no objection to that, is there? [10]

Mr. Ball: No.

Trial Examiner Bokat: Is there any objection to the receipt of Board's Exhibit No. 1 in evidence?

Mr. Ball: Does the record show that an answer was filed in time, and proper service made by the parties?

Mr. Walker: I believe so.

Trial Examiner Bokat: The documents above referred to may be received in evidence and marked as Board's Exhibit No. 1.

(Whereupon the documents hereinabove referred to was received in evidence and marked as Board's Exhibit 1.)

Mr. Walker: With respect to the matter of proof of jurisdiction, Mr. Ball and I are planning to set that matter over for the present, contemplating that a written stipulation for the same may be prepared.

Trial Examiner Bokat: Is that satisfactory?

Mr. Ball: That is satisfactory.

Mr. Walker: Relative to the allegations in paragraph 6 of the complaint, I ask the Board to take judicial notice of its decision and direction of election in case R1863, together with the subsequent certification of representative issued by the Board on August 10, 1940, and received by the respondent August 13, 1940.

Trial Examiner Bokat: I will do so.

Mr. Walker: Mr. Reporter, if you will mark a copy of the decision and direction of election, and

a copy of the certifica- [11] tion of representative
in Case R1863 as Board's Exhibit No. 2?

(Whereupon the documents hereinabove re-
ferred to were marked as Board's Exhibit 2 for
Identification.)

Mr. Ball: Off the record?

Trial Examiner Bokat: Off the record.

(Discussion off the record.)

Mr. Walker: I now offer what has been marked
as Board's Exhibit No. 2 for Identification.

Trial Examiner Bokat: Is there any objection?

Mr. Ball: No objection.

Trial Examiner Bokat: There being no objec-
tion, it will be received and marked in evidence as
Board's Exhibit No. 2.

(Whereupon the documents heretofore
marked as Board's Exhibit 2 for Identification
were received in evidence.)

BOARD'S EXHIBIT 2

United States of America

Before the National Labor Relations Board

In the Matter of Montgomery Ward & Company
and Warehousemen's Union, Local No. 26, Af-
filiated with I. B. of T. C. S. & H. or A.,
A. F. of L.

Case No. R-1863.—Decided June 24, 1940

General Merchandising Mail Order Business—
Investigation of Representatives: controversy con-

cerning representation of employees: refusal of Company to recognize Union until certified by Board—Unit Appropriate for Collective Bargaining; all employees engaged in warehouse work excluding supervisory employees. Election Ordered.

Mr. F. D. Roth, of Oakland, Calif., and Mr. John A. Barr, of Chicago, Ill., for the Company.

Green, Bosen & Landye, by Mr. James Landye, of Portland, Oreg., for the Union.

Miss Ann Landy, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

Statement of the Case

On April 5, 1940, Warehousemen's Union, Local No. 26, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America,¹ herein called the Union, filed with the Regional Director for the Nineteenth Region (Seattle, Washington) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Montgomery Ward & Company, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

¹Referred to in the order directing investigation as Warehousemen's Union, Local No. 26, affiliated with I. B. of T. C. S. & H. of A., A. F. of L.

On April 27, 1940, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 2, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice. On May 6, 1940, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company and the Union. On May 9, 1940, the Regional Director issued a notice of postponement of hearing, copies of which were served upon the same parties. Pursuant to the notice of hearing and notice of postponement, a hearing was held on May 27 and 28, 1940, at Portland, Oregon, before Thomas B. Graham, the Trial Examiner duly designated by the Board. The Company and the Union were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. During the course of the hearing the Trial Examiner made several ruling on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Company

Montgomery Ward & Company, an Illinois corporation having its principal executive offices in Chicago, Illinois, is engaged in the distribution of merchandise through the media of mail order houses and retail stores. The Company owns, operates, and maintains 9 mail order houses, 5 mail order warehouses, 260 order offices, and 625 retail stores throughout the United States. About 20,000,000 customers throughout the United States and in many foreign countries are served by the Company. The Company's net sales for 1939 amounted to \$474,882,032.

This proceeding is concerned solely with employees of the Company in Portland, Oregon, where the Company operates a mail order house, a retail store, and a separate warehouse. Approximately 90 per cent of the merchandise distributed by the mail order house and the store is shipped to Portland from points outside the State of Oregon. About 60 per cent of the customers of the mail order house live outside the State of Oregon.

Although located in the same building, the mail order house and the retail store are operated as separate units. On May 23, 1940, the mail order house employed over 1200 workers, the retail store 175, and the warehouse 27. The Company denies that the Board had jurisdiction over employees of the retail store.

II. The Organization Involved

Warehousemen's Union, Local No. 26, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company engaged in warehouse work.

III. The Question Concerning Representation

Shortly before the hearing the Union requested recognition as bargaining representative for the employees in the warehouse. The Company took the position that it could not recognize the Union as bargaining agent until the question of proper collective bargaining unit was determined by the Board. At the hearing the Company and the Union took conflicting positions regarding the appropriate unit. We find that a question has arisen concerning the representation of employees of the Company.

IV. The Effect of the Question Concerning Representation Upon Commerce

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Appropriate Unit

In its petition the Union alleged that employees at the Company's warehouse engaged in warehouse work constitute an appropriate unit. The Union defines as warehouse workers employees who handle merchandise. At the hearing the Union amended its petition and alleged that all warehouse workers at the mail order house as well as the warehouse should be included in the unit.

The Company requests a unit comprising all the employees of the mail order house and the warehouse, excluding only five persons engaged, at the warehouse, in receiving and handling merchandise consigned to the retail store. Neither the Union nor the Company desire the inclusion of employees at the store itself.

V. H. Brooks, superintendent of operations at the mail order house, testified at the hearing regarding whether or not the employees in various departments and work classifications handle merchandise. Counsel for the Union, on the basis of this testimony, summarized as follows the classifications claimed by the Union as falling within the appropriate unit: all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package opening department, except authenticators; all employees of the central repair unit,

except those engaged in office work; all employees in the jewelry repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division, except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock control, and catalog service departments; all porters; and all employees at the warehouse.

The employees at the mail order house whom the Union would exclude from the unit consist primarily of clerical workers who are ineligible for membership in the Union but are eligible for membership in the Office Employees Union, a labor organization, which, like the Union, is affiliated with the American Federation of Labor. The Office Employees Union is engaged in organizing them.

The Company claims that the close functional coherence and mutual interdependence of the operations of the mail order house necessitates that all its employees be included in the same unit. In support of this claim, V. H. Brooks testified generally that employees who handle merchandise are frequently transferred to positions involving clerical work, and vice versa, but offered no specific evidence as to the number of employees affected by such transfers. The Company also offered testimony to the effect that its mail order house employees in other cities have been organized in plant-wide units.

The Company has not entered into collective bargaining agreement with any labor organization in its mail order houses.

Under the circumstances of this case we find the unit requested by the Union to be appropriate. Organization of the employees has proceeded upon the basis of warehouse workers' unit, and the Union is the only labor organization existing among the employees involved.

The Company further contends that five warehouse employees who are on the retail store's separate pay roll should be excluded from the unit on the ground that the Board has no jurisdiction over the store. It is not contended that the work of these five employees differs from that of the other warehouse employees in any way except that they handle goods consigned to the store rather than to the mail order house. In another proceeding the Board had assumed jurisdiction over the employees of the store² and there appears to be no other reason for excluding these five employees from the unit. We shall include them. In accordance with our usual custom we shall exclude supervisory employees from the unit.

We accordingly find that the following employees of the Company employed at its Portland mail order house and warehouse constitute a unit appropriate

²In the Matter of Montgomery Ward & Company and Reuben Litzenberger et al., 9 N. L. R. B. 538, enf'd *Montgomery Ward & Company v. National Labor Relations Board*, 107 F. (2d) 555 (C. C. A. 7).

for the purposes of collective bargaining: all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package opening department, except authenticators; all employees of the central repair unit, except those engaged in office work; all employees in the jewelry repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division, except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock control, and catalog service departments; all porters; and all employees at the warehouse, excluding supervisory employees.

VI. The Determination of Representatives

At the hearing the Union and the Company stipulated that a number of the employees of the Company in the unit claimed by the Union have signed application cards for membership in the Union. We find that the question concerning representation which has arisen can best be resolved by an election by secret ballot. The employees of the Company within the appropriate unit who were employed by the Company during the pay-roll period immediately preceding the date of our Direction of Election herein, including those employees who did not work during such pay-roll period because they were ill

or on vacation and employees who were then or have since been temporarily laid off, but excluding those who have since quit or been discharged for cause, shall be eligible to vote.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of Montgomery Ward & Company, Portland, Oregon, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. All merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators, all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package opening department, except authenticators; all employees of the central repair unit, except those engaged in office work; all employees in the jewelry repair unit engaged in handling merchandise, except watchmakers; all employees in the merchandise division, except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock control, and catalog service departments; all porters; and all employees at the warehouse; excluding super-

visory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for the purposes of collective bargaining with Montgomery Ward & Company, Portland, Oregon, an election by secret ballot shall be conducted as early as possible but not later than thirty (30) days from the date of this Direction of Election under the direction and supervision of the Regional Director for the Nineteenth Region, acting in this matter as agent for the National Labor Relations Board and subject to Article III, Section 9, of said Rules and Regulations, among all merchandise checkers in the shipping department; all receiving clerks in the receiving department; all employees on the freight elevators; all sorters, completers, and packers, but not billers, in the packing and billing department; all employees of the package opening department, except authenticators; all employees of the central repair unit, except those engaged in office work; all employees in the jewelry repair

unit engaged in handling merchandise, except watch-makers; all employees in the merchandise division, except timekeepers and employees engaged in taking orders; all employees in the supply and multigraph department who fill in and stock supplies; all employees who handle merchandise in the operating auditing, stock control, and catalog service departments; all porters; and all employees at the warehouse; who were employed by the Company at its Portland, Oregon, mail order house and warehouse during the pay-roll period immediately preceding the date of this Direction of Election, including those employees who did not work during such pay-roll period because they were ill or on vacation, and employees who were then or have since been temporarily laid off, but excluding supervisory employees and employees who have since quit or been discharged for cause, to determine whether or not said employees desire to be represented by Warehousemen's Union, Local No. 26, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, affiliated with the American Federation of Labor, for the purposes of collective bargaining.

Mr. Edwin S. Smith took no part in the consideration of the above Decision and Direction of Election.

United States of America
Before the National Labor Relations Board
Case No. R-1863

In the Matter of MONTGOMERY WARD & COMPANY and WAREHOUSEMEN'S UNION, LOCAL No. 206 affiliated with I. B. of T. C. S. & H. of A., A. F. of L.

CERTIFICATION OF REPRESENTATIVES

On June 24, 1940, the National Labor Relations Board, herein called the Board, issued its Decision and Direction of Election in the above entitled proceeding. ¹Pursuant to the Direction an election by secret ballot was conducted on July 19, 1940, under the direction and supervision of the Regional Director for the Nineteenth Region (Seattle, Washington). On July 22, 1940, the Regional Director, acting pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, issued and duly served upon the parties an Election Report. No objections to the conduct of the ballot or to the Election Report were filed by any of the parties.

As to the balloting and its results, the Regional Director reported as follows:

(1) 24 N. L. R. B., No. 100.

Total on eligibility list.....	470
Total ballots cast.....	380
Total votes in favor of Warehousemen's Local 206	328
Total votes against Warehousemen's Local 206	50
Total challenged votes.....	2
Total on eligibility list not voting.....	90

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Sections 8 and 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

It Is Hereby Certified that Warehousemen's Union, Local No. 206, affiliated with International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, affiliated with the American Federation of Labor, has been designated and selected by a majority of all merchandise checkers in the shipping department; receiving clerks in the receiving department; employees on the freight elevators, all sorters, completers, and packers, but not billers, in the packing and billing departments; employees of the package-opening department, except authenticators; employees of the central repair unit, except those engaged in office work; employees in the jewelry repair unit engaged in handling merchandise, except watchmakers; employees in the merchandise division, except timekeepers and em-

ployees engaged in taking orders; employees in the supply and multigraph department who fill in and stock supplies; employees who handle merchandise in the operating, auditing, stock control, and catalog service departments; porters; and employees at the warehouse; of Montgomery Ward & Company at its Portland, Oregon, mail order house and warehouse, excluding supervisory employees, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, Warehousemen's Union, Local No. 206, affiliated with International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, affiliated with the American Federation of Labor, is the exclusive representative of all such employees, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 9th day of August, 1940.

J. WARREN MADDEN,

Chairman,

EDWIN S. SMITH,

Member,

WM. M. LEISERSON,

Member,

(Seal)

NATIONAL LABOR
RELATIONS BOARD.

Mr. Walker: I will call Mr. Estabrook.

J. W. ESTABROOK

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: J. W. Estabrook, 500 Labor Temple, Portland, Oregon.

Q. (By Mr. Walker) Where do you reside?

[12]

Trial Examiner Bokat: We have his address.

Q. (Mr. Walker continuing) What is your occupation?

A. Financial Secretary of Warehousemen's Local No. 206.

Q. With what organization is Local 206 affiliated?

A. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the A. F. of L.

Q. Chartered by the International Brotherhood of Teamsters? A. Yes.

Q. How long have you held the position that you now occupy? A. About seven years.

Q. What are your duties in that regard?

A. My duties are organizing people that rightfully come under our jurisdiction. I am the chief executive officer of the union. My duties are to discharge all the work that comes before our organization from time to time, or in straightening out any matters that pertain to the union.

(Testimony of J. W. Estabrook.)

Q. Is Local 206, the organization in which you now hold office, the same organization that was certified under the document which has been received in evidence as Board's Exhibit 2? A. Yes.

Q. Subsequent to August 10, 1940, or at any time, have you met Mr. Barr?

Mr. Ball: Just a minute. I move that the witness be instructed to answer the question Yes or No. It calls for a Yes [13] or No answer.

The Witness: What is the question?

Trial Examiner Bokat: Will you read the question back, Mr. Reporter?

(Whereupon the question referred to was read aloud by the reporter as above recorded.)

A. I have, yes.

Q. (By Mr. Walker) Where did you meet him?

A. In this building, the first time.

Trial Examiner Bokat: What do you mean by this building?

A. In the New United States Court House Building.

Q. (Mr. Walker continuing) About when was that, Mr. Estabrook?

A. I couldn't give you the correct date; I don't know what date it was during the time of the first meeting.

Trial Examiner Bokat: Will the parties stipulate when that was, if they know?

The Witness: It was at the time of the first hearing.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Can the parties stipulate when that hearing took place?

Mr. Walker: About May, 1940.

Trial Examiner Bokat: Well, the decision would probably indicate the date.

Mr. Walker: It was sometime in May, 1940, I am pretty sure.

Trial Examiner Bokat: Who was Mr. Barr?

The Witness: The gentleman right there (pointing). [14]

Trial Examiner Bokat: I don't mean that. Do you know what his title was, or what his connection was with the respondent?

Mr. Ball: It is understood that Mr. Barr at that time, at the time Mr. Estabrook met him, or at the time referred to, was acting as counsel for Montgomery Ward & Company in the course of a representation hearing had here.

Trial Examiner Bokat: All right.

Q. (Mr. Walker continuing) After that, did you have occasion to meet him again?

A. Yes.

Q. Where was the next time?

A. Washington, D. C.

Q. About when was that?

A. That was in September; the early part of September.

Q. 1940? A. Yes.

Q. Did you have a conversation with him at that time? A. I did.

(Testimony of J. W. Estabrook.)

Q. And what was the conversation?

A. I asked Mr. Barr if I could have an appointment with him when I got to Chicago.

Q. Did he reply? A. Yes.

Q. What did he say? A. He said I could.

[15]

Q. Was there anything else said about a conversation at that time, or anything further in that particular conversation?

A. No; we were out at a ball game; we discussed the baseball game.

Q. Did you obtain an appointment with him after that?

A. Yes, I called up Mr. Barr long distance from New York and obtained an appointment.

Q. From New York, did you go to Chicago?

A. I did.

Q. Did you meet Mr. Barr in Chicago?

A. Yes.

Q. Did you meet anybody else there?

A. I met Mr. Barr, Mr. Ball, and Mr. Heidinger.
Trial Examiner Bokar: Will you spell that last name?

The Witness: I don't know.

Mr. Ball: H-e-i-d-i-n-g-e-r (spelling).

Trial Examiner Bokar: Thank you.

Q. (Mr. Walker continuing) Where was that meeting? A. In their office.

Q. About when was it?

A. It was in the latter part of September.

(Testimony of J. W. Estabrook.)

Mr. Ball: Let the record show it was on September 23.

Trial Examiner Bokat: Is that agreed?

Mr. Walker: That is agreeable.

Trial Examiner Bokat: All right. [16]

Q. (Mr. Walker continuing) Did you have a conversation with any or all the persons you have mentioned?

A. My first conversation was with Mr. Barr.

Q. What was said?

A. We discussed the agreement,—the proposed agreement,—that I had presented to Mr. Barr.

Mr. Ball: Just a minute. I will object to the answer as being a general statement and not a statement of what was said.

Trial Examiner Bokat: Yes, I will sustain the objection. When did you present this agreement? After this meeting?

The Witness: Yes, I did.

Trial Examiner Bokat: What was said?

The Witness: Well, I am sure I could not remember what was said word for word.

Trial Examiner Bokat: Of course not. I don't mean that. Tell us substantially what it was?

The Witness: The discussion amounted to this, that Mr. Barr informed me that I was to negotiate a contract with Mr. Powell and Mr. Huddleston.

Trial Examiner Bokat: And who are Mr. Powell and Mr. Huddleston?

(Testimony of J. W. Estabrook.)

The Witness: Mr. Powell,—I don't know as I can tell exactly what he is, other than that he is in charge of the labor relations on the Coast.

Trial Examiner Bokat: And who is Mr. Barr? Just a moment, [17] I think that is already in the record. Who is Mr. Huddleston?

Mr. Ball: Do you mean for him to stand up?

Trial Examiner Bokat: No. What is his official position with the company?

Mr. Ball: Mr. Estabrook has described Mr. Powell's position correctly; he was the representative in charge of those matters.

Trial *Examination* Bokat: And who was Mr. Huddleston?

The Witness: He is the manager of the store here.

Mr. Ball: Just a moment. Let us have that correctly. Let the record show that he is the manager of the mail order house.

The Witness: Oh.

Mr. Walker: Will you mark this, Mr. Reporter?

(Whereupon the document hereinabove referred to was marked as Board's Exhibit 3 for Identification.)

Q. (Mr. Walker continuing) Mr. Estabrook, I hand you what has been marked as Board's Exhibit 3 for Identification and ask you what that is?

A. That is our proposed wage scale and working agreement.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Is that the one you presented at this meeting?

The Witness: Yes.

Mr. Walker: I offer in evidence what has been marked as Board's Exhibit 3 for Identification.

Trial Examiner Bokat: Is there any objection?

Mr. Ball: No objection. [18]

Trial Examiner Bokat: It will be received and marked in evidence as Board's Exhibit 3.

(Whereupon the document heretofore marked as Board's Exhibit 3 for Identification was received in evidence.)

BOARD EXHIBIT No. 3

AGREEMENT

This agreement made and entered into this day of1940, by and between Montgomery Ward & Company, hereinafter called the Employer, and the Warehousemen's Union Local #206, I. B. of T. C. W. & H. of America, A. F. of L., hereinafter called the Union.

Article 1. The employer agrees to recognize the Union as sole collective bargaining agency for the employes performing work in the classifications listed below in Article 4 of this agreement. No superintendent having authority from the Employer to hire or discharge men or women shall be a member of this Union.

Article 2. The Employer agrees to give preference of employment to unemployed members of the

(Testimony of J. W. Estabrook.)

Union and in the event the Union is unable to furnish satisfactory help upon the request of the Employer, he (the Employer) may employ a non-member of the Union provided such person makes application for membership in the Union within seven (7) days after taking employment.

Article 3. Section 1. Eight (8) hours within nine (9) consecutive hours shall constitute a day's work. Forty (40) hours consisting of eight (8) hours, Monday to Friday inclusive, shall constitute a week's work.

Sec. 2. Straight time shall be any eight (8) consecutive hours from 8:00 a.m. to 6:00 p.m. Monday to Friday inclusive. All other time shall be at the overtime rate as established in Article 5 of this Agreement.

Sec. 3. Any work performed on any of the following named holidays shall be at the overtime rate of time and one-half as established in Article 5 of this agreement:—Saturdays, Sundays, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, and Christmas Day.

Article 4. The following shall be the minimum wages paid in their respective classifications:

STOCK ROOM

Stockman	\$35.00	per	week
Assistant Stockman	32.50	"	"
Stock Helper, male.....	30.00	"	"
Stock Order Filler, packer & checker.....	30.00	"	"
Warehousemen	33.50	"	"

(Testimony of J. W. Estabrook.)

SCHEDULE ACTIVITY

Heavy Pit Order Filler.....	32.50	“	“
House Sale Order Filler “C” line.....	30.00	“	“
House Sale Order filler “A” & “B” line.....	28.50	“	“
Order filler, checker, wrapper, women.....	25.00	“	“
Packer, men	28.50	“	“
Packer, women	25.00	“	“
Correction Clerks, men.....	32.50	“	“
Correction Clerks, women.....	27.50	“	“
Production Control Clerk.....	30.00	“	“
Outline Clerk	25.00	“	“
Mailable Pit Order Filler & Part lot packer	30.00	“	“

EXAMINATION

Examiner “C” line.....	35.00	“	“
Assistant Examiner “e” line.....	32.50	“	“
Examiner “A” & “B” line.....	27.50	“	“
Stock preparation, women.....	25.00	“	“
Stock preparation, men.....	28.50	“	“

PACKING & BILLING

Sorter	22.50	“	“
Completer	27.50	“	“
Packers, men	30.00	“	“
Packers, women	27.50	“	“
Scalers, Multiple	22.50	“	“
Scalers, Single	25.00	“	“
Scalers, Pit	27.50	“	“
Billers, Multiple	26.00	“	“
Billers, Single	25.00	“	“
Billers, C. O. D.....	27.50	“	“
Error Correction Clerk.....	27.50	“	“
Diverted Order Clerk.....	27.50	“	“
Belt Inspector	22.50	“	“
Refund Control Clerk.....	25.00	“	“
Large Refund Control Clerk.....	25.00	“	“

(Testimony of J. W. Estabrook.)

PREFERRED ATTENTION ORDER UNITS

Completer	28.50	"	"
Packer	30.00	"	"
Biller	28.00	"	"
Preferred Attention Scaler.....	27.50	"	"

SHIPPING & RECEIVING FLOOR

Shipping & Receiving Clerks.....	35.00	"	"
Checker	37.50	"	"
Elevator Opr. & Car unloading.....	32.50	"	"
Car Loaders	37.50	"	"

PACKAGE OPENING UNIT

Sign-up clerks, women.....	27.50	"	"
Sign-up clerks, men.....	32.50	"	"
Stock preparation girls.....	25.00	"	"

RETAIL CITY DELIVERY

Shipping clerks	35.00	"	"
Receiving clerks	35.00	"	"
Checker	35.00	"	"

BELT ROOM CUTTING UNIT

Stockman	35.00	"	"
Assistant stockman	32.50	"	"
Pipe shop order filler & stockman.....	35.00	"	"
Porters	27.50	"	"
Technical Shade Cutter.....	35.00	"	"
Technical Asst. Shade Cutter.....	32.50	"	"
Linoleum Cutter	35.00	"	"
Crater	30.00	"	"
Tailoresses	26.50	"	"
Head Tailoress	28.50	"	"

Any wages now being paid above the minimum provided for herein shall not be reduced for any cause. Adjustment of disputes or differences on

(Testimony of J. W. Estabrook.)

classifications will be settled through the Board of Adjustment provided for in Article 13 of this agreement.

Article 5. The overtime rate of pay shall be time and one-half ($1\frac{1}{2}$). No trading of overtime for time off.

Article 6. In the event that the Employer does not at present employ a working foreman, forelady, supervisor, or instructor, it is agreed that if one is employed, he or she shall receive fifty (.50) cents a day above the rate of pay for the highest classification herein contained.

Article 7. If employes are worked over five (5) consecutive hours without a meal period, all time in excess of five (5) hours without such meal period shall be at the overtime rate. Meal periods shall be so arranged as not to interfere with the normal operation of the business.

Article 8. Section 1. There shall be no discrimination against any employes for Union activity or membership.

Sec. 2. The Employer shall have the right to discharge any employes for insubordination, drunkenness, incompetence or failure to perform work as required or to observe safety rules and regulations and the Employer's house rules, which shall be conspicuously posted. In the event any employee feels he or she has been discriminated against or unjustly discharged, he or she shall have a right to review his or her case by the Board of Adjustment, as set

(Testimony of J. W. Estabrook.)

forth in Article 13 of this agreement. In the event the Board of Adjustment finds the discharge to have been unjustifiable, said Board shall order reinstatement of such employee with full payment for lost time.

Sec. 3. Where the employer requests an additional medical examination of an employee, and there is a doubt in the mind of the employee as to the proper diagnosis of his or her case, the Union shall request a further examination by an impartial examiner, (to be paid by the Union). In the event both medical examiners do not agree in their findings it is further agreed that a third examiner shall be called for a final decision; said expense to be equally divided between the Employer and the Union, and the employee either returned to work with back pay or dismissed. New employees must have physical examination within thirty (30) days.

Article 9. Lay-offs: If the work becomes slack and the Employer deems it advisable to reduce forces, employees who have been employed less than six (6) months shall be laid off first. If after all the men or women who have been employed less than six (6) months have been laid off, the Employer considers it advisable to take further measures, further lay-offs shall be in accordance with the seniority of the various employees on each floor.

In rehiring, those employees laid off last will be rehired first, and no new employees will be hired until the list of former employees is exhausted.

(Testimony of J. W. Estabrook.)

Seniority at Montgomery Ward & Company's main store in Portland will be as follows: Employees now employed will have preference over employees transferred from other warehouses regardless of length of time employees at other warehouses might have with the Company. Any employees transferred from other warehouses to the main store must draw the scale provided in this agreement for extra employees. In case of lay-offs employees coming in from other warehouses will be the first to be laid off.

Article 10. Employers shall adhere to their past practice of granting vacations but in no case shall a vacation be less than one week with full pay each year.

Article 11. Strikes: The Union agrees not to engage in any strikes or stoppage of work. The Employer agrees not to engage in any lockout. Any action of the employees leaving jobs for their own protection in cases of a legally declared strike by some Union directly working on the job, if said strike is sanctioned and approved by the Portland Central Labor Council, shall not constitute a violation of this clause of this agreement.

Article 12. Any person receiving wages or conditions or periods of vacation in excess of the minimums set forth herein shall not have any such benefits taken away from them, because of the signing of this agreement. All holidays, when not worked, shall be paid for as an eight hour day.

(Testimony of J. W. Estabrook.)

When holidays are worked, the rate of pay shall be time and one-half ($1\frac{1}{2}$).

Article 13. A Board of Adjustment is hereby created to be composed of two (2) representatives of each contracting party. Said Board shall organize at once and shall elect a Chairman and Secretary and shall have the power to adjust any differences that may arise between the parties hereto regarding the meaning or enforcement of this agreement. Said Board shall meet for consideration of all matters that may be referred to it within forty-eight (48) hours subsequent to receipt by its Secretary by notice of same. The Board decision shall be signed by a majority of the Board. If the Board cannot agree on any question referred to it within forty-eight hours, they shall then choose a fifth member who shall have no connection with either contracting party and the decision of a majority of the Board of five shall be final and binding on both parties. Pending the decision of any question referred to the Board, work shall be continued in accordance with the provisions of this contract.

Article 14. This agreement shall go into effect the day of.....1940, and remain in effect until the.....day of.....194 , and thereafter subject to thirty (30) days' notice of a desire to change by either party. If notice to desire to change or modify this agreement is served as hereinabove provided, negotiations shall

(Testimony of J. W. Estabrook.)

start twenty (20) days from the date such notice is received.

In Witness Whereof, the parties hereto have caused these presents to be executed the day and year first hereinabove written.

MONTGOMERY WARD &
COMPANY

.....

.....

WAREHOUSEMEN'S UNION
LOCAL #206

.....

.....

Mr. Ball: May I, in connection with the offer, ask one question of the witness?

Trial Examiner Bokat: Before it is received?

Mr. Ball: Yes.

Trial Examiner Bokat: On voir dire, is that what you had in mind?

Mr. Ball: Yes.

Trial Examiner Bokat: Go ahead. Let's see what it is.

Mr. Ball: You did not give a copy of this contract at that time to Mr. Barr, did you?

The Witness: I certainly did.

Mr. Ball: All right.

Trial Examiner Bokat: May I interrupt before you proceed, Mr. Walker?

(Testimony of J. W. Estabrook.)

Mr. Walker: Certainly.

Trial Examiner Bokat: Is it your testimony, Mr. Estabrook, that at this meeting which you have described as being in Chicago, you were informed that Mr. Powell and Mr. Huddleston were to be the company's representatives to meet with you with regard to further bargaining? [19]

The Witness: That is correct.

Trial Examiner Bokat: All right. Proceed.

Q. (Mr. Walker continuing) After delivering a copy of Board's Exhibit No. 3 to Mr. Powell,—I mean, to Mr. Ball, Mr. Barr, and Mr. Heidinger, was anything done with respect to the agreement?

A. No, not there.

Q. Was it discussed?

A. We discussed it, yes.

Q. What was the discussion?

A. Well, the discussion was that,——

Mr. Ball: I will object to that, unless the question is made more definite, as to whether or not **this** discussion took place between Mr. Barr and Mr. Estabrook, or between Mr. Estabrook and the three gentlemen named; that is, whether they were all together, or individually, or just what the circumstances were.

Trial Examiner Bokat: I think that is a fair request. Will you clarify that, Mr. Walker?

Mr. Walker: Yes.

Q. (Mr. Walker continuing) At which time was

(Testimony of J. W. Estabrook.)

there a discussion relative to the copy of the agreement, the meeting with Mr. Barr alone, or the meeting with Mr. Barr, Mr. Ball, and Mr. Heidinger?

A. All three of the gentlemen made the same statement; probably [20] not in the same words.

Q. Which ones made which statements, and when?

Trial Examiner Bokar: You mean that the same remarks were made by all of them?

The Witness: No.

Trial Examiner Bokar: At the same time, while they were together?

The Witness: No. I first discussed it with Mr. Barr in his office. Mr. Barr took me into the office of Mr. Heidinger and introduced me to Mr. Heidinger, and we had a discussion there, and then Mr. Barr took me to Mr. Ball's office, and we had another discussion there.

Trial Examiner Bokar: I think that is quite clear. What happened?

The Witness: I was told that Mr. Powell and Mr. Huddleston were the two men that we were to have negotiations with. They also stated that there might be one or two points that Mr. Huddleston and Mr. Powell would not be able to discuss with me, which they would have to take up with the company at the Chicago office.

Trial Examiner Bokar: Did they mention what those points were?

(Testimony of J. W. Estabrook.)

The Witness: No, they did not.

Trial Examiner Bokat: All right.

Q. (Mr. Walker continuing) What else took place at that meet- [21] ing with these three gentlemen? A. That was about all.

Q. Was there any discussion relative to Mr. Powell and Mr. Huddleston, other than what you have already related?

A. Not that I can remember.

Q. Do you recall whether or not there was any discussion relative to the bonus plan?

A. No; not that I can recollect.

Q. Do you know what has ultimately become of the bonus plan since that meeting in Chicago that you have related?

Mr. Ball: I will object to that as wholly irrelevant to any issue in this case.

Trial Examiner Bokat: I take it that it is subject to connection. I am at a loss to know.

Mr. Walker: Then I will withdraw the question.

Trial Examiner Bokat: All right.

Q. (Mr. Walker continuing) Was the agreement that was delivered to the three representatives of Montgomery Ward Company examined by them at the time of the meeting you have described?

A. I didn't deliver an agreement to all three of them.

Q. Who did you deliver the agreement to?

A. Mr. Barr was the man I gave the agreement to.

(Testimony of J. W. Estabrook.)

Q. Did Mr. Barr discuss any of the particular clauses of the agreement? [22]

A. No, he did not.

Q. Did he refer to any of the clauses of the agreement?

A. The only reference that he made,—and, of course, I don't know what clauses he meant,—it was that Mr. Powell and Mr. Huddleston would be able to conduct negotiations or discussions on most of the points that would come up in the agreement. However, there was one or two points that was against company policy, and that would have to be a matter referred to the Chicago office. And at that time,—I don't remember which of the three gentlemen told me this,—but he said that there wouldn't be any stalling, or anything like that; that if we got stuck on a point, Powell and Huddleston could contact the Chicago office, and Chicago would say, or, rather, would see that they would get the information that they needed. They also stated that they had no reason to hold up the negotiations in any way.

Q. Was there any discussion relative to what phase of the company policy was involved at that time?

A. I think there was a discussion on closed shop.

Q. What was that?

Mr. Ball: I don't want to enter an objection constantly, but I would like to have these questions

(Testimony of J. W. Estabrook.)

clear. I would like to know who said it, with whom the discussions were, and when.

Trial Examiner Bokat: I think you are right about that, Mr. Ball. [23]

Mr. Ball: It will improve the problem a great deal, and simplify cross examination.

The Witness: Well, I can only get it down to two men; it was either Mr. Barr or Mr. Heidinger.

Q. (Mr. Walker continuing) Who made the last statement? A. That is right.

Trial Examiner Bokat: And what was that, again?

The Witness: One of the two gentlemen made that statement.

Trial Examiner Bokat: Either one of the two gentlemen?

The Witness: Yes; either one or the other made the statement that it was against the company policy to have a closed shop, that they had never had one.

Trial Examiner Bokat: I assume that there was a clause in the agreement calling for closed shop?

The Witness: Yes.

Trial Examiner Bokat: Did either of these men examine the agreement before they discussed it with you?

The Witness: I never saw them do so.

Trial Examiner Bokat: I assume they had an opportunity to look at it?

(Testimony of J. W. Estabrook.)

The Witness: Yes, but the meeting in Chicago was to find out who we were going to do negotiating with. Up until that time I didn't know.

Q. (Mr. Walker continuing) Did you meet with any other officials of Montgomery Ward & Company in Chicago? [24] A. No, sir.

Q. Following that, what did you do?

A. I returned to Portland.

Q. After returning to Portland, did you have any further contact with any representative of Montgomery Ward & Company?

A. Yes, my contacts from then on were with Mr. Powell or Mr. Huddleston.

Q. When did you first contact Mr. Powell or Mr. Huddleston?

A. I couldn't give you the exact date; it was sometime in October.

Q. How did you first contact them?

A. By telephone.

Q. How did you place the call? Who did you place the call to? A. Mr. Huddleston.

Q. And did you contact him? A. Yes.

Q. Did you have any discussion with him at that time? A. Yes.

Q. What was it?

A. Concerning the agreement.

Q. What was said? Is this the telephone conversation now, that you are talking about?

A. Oh, no.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: As a result of the telephone conversation you had a meeting with him?

[25]

The Witness: Yes.

Trial Examiner Bokat: That was in the same month, in October, 1940?

The Witness: Yes.

Q. (Mr. Walker continuing) Where did you meet with Mr. Huddleston?

A. In his office.

Q. Who was with him?

A. Mr. Barth and Mr. Powell.

Trial Examiner Bokat: Now, who is Mr. Barth, if you know?

The Witness: The gentleman in the gray suit (pointing).

Trial Examiner Bokat: What is his position?

The Witness: I think he is the manager of the retail store in Portland.

Trial Examiner Bokat: What is Mr. Barth's designation, Mr. Ball?

Mr. Ball: Mr. Barth is the manager of the retail store in Portland, Oregon.

Trial Examiner Bokat: All right.

Q. (Mr. Walker continuing) Prior to the time you met with Mr. Huddleston and Mr. Powell, had you met with Mr. Huddleston alone?

A. Not that I recall.

Q. Now, will you state whether or not a copy of Board's Exhibit 3 was present at the meeting be-

(Testimony of J. W. Estabrook.)

tween yourself and Mr. Powell [26] and Mr. Huddleston? A. Yes, it was.

Q. Was anyone else present representing Local 206? A. Mr. Holmes.

Q. And what is Mr. Holmes' position?

A. Business Agent.

Q. Will you just go ahead and relate in your own words what took place at that meeting?

A. There was a general discussion of the agreement, and we started out by,—I think I made the statement,—in fact, I am sure I did, that we start out with Article 1 of the agreement.

Trial Examiner Bokar: May I see Board's Exhibit 3, please?

The Witness: Yes. (Hands document to Examiner.)

Q. (Mr. Walker continuing) Just go ahead and answer the question?

A. That we would discuss Article 1, and if we couldn't agree on it, why, we would mark it as such, and then go to the next article, and then finally find out how many we could agree on and how many we could not agree on. So that was agreeable with them, and that is the way we proceeded, along that line.

Q. Do you know a Mr. Towers? A. Yes.

Q. What is his position?

A. He is Financial Secretary of the Warehousemen's Union in [27] Oakland, California.

Q. Was he at the meeting? A. Yes.

(Testimony of J. W. Estabrook.)

Q. Was the agreement, or copies of the agreement which were before the parties, discussed?

A. Yes.

Q. What was the discussion?

A. Well, just what I told you, that we all agreed that we would start right in from the beginning of the agreement, article by article, to see how many we could agree on and how many we could not.

Q. Was that done? A. Yes.

Q. Mr. Estabrook, will you refer to Board's Exhibit No. 3, and state whether or not anything was said relative to paragraph 1 of the agreement at that meeting?

A. Well, they didn't agree to it.

Trial Examiner Bokar: You are referring specifically to Article 1, and not to paragraph 1?

Mr. Walker: Wait until I get my copy.

Trial Examiner Bokar: I want the record to be clear just what is being considered.

Mr. Ball: May I enter my objection to the question and answer on the ground that it does not state what was said, but merely a conclusion as to what the result was. [28]

Trial Examiner Bokar: Will you read the question and answer back, Mr. Reporter?

(Thereupon the last question and answer were read aloud by the reporter as above recorded.)

Mr. Ball: For the reason that,—

Trial Examiner Bokar: (Interposing) I will let

(Testimony of J. W. Estabrook.)

the answer stand, but, in effect, sustain the objection, by having the witness state what was said. You say that you did not reach an agreement?

The Witness: That is correct.

Trial Examiner Bokar: Tell what was stated, and by whom?

The Witness: Mr. Powell did most of the talking.

Trial Examiner Bokar: What did he say about Article 1?

The Witness: Article 1 is our closed shop clause, and Mr. Powell stated that the company policy has always been that they wanted to have the right to hire anybody they wanted, whether they belonged to the union or not.

Trial Examiner Bokar: I think you are mistaken. Are you sure that Article 1 refers to the closed shop?

The Witness: Oh, I beg your pardon.

Trial Examiner Bokar: Do you want to modify your answer?

The Witness: Yes, I will change the answer.

Trial Examiner Bokar: What was said concerning Article 1?

The Witness: The statement of Mr. Powell on Article 1 was that they objected to it the way it was written, and that if [29] we agreed to substitute whatever the law was for Article 1, they would agree to it. In other words, there was just some discussion as to changing it to read that the em-

(Testimony of J. W. Estabrook.)

ployer agreed to follow the law and give us the collective bargaining rights, or give the collective bargaining rights to our organization, as stated by the Board. I can't state it in the exact language. That is about all on Article 1.

Trial Examiner Bokat: Was there any reply by anyone representing the unions at that time?

The Witness: We told them it would stand the way it was at that time.

Trial Examiner Bokat: That was your answer?

The Witness: Yes.

Q. (Mr. Walker continuing) Then what did you do after this discussion on Article 1?

A. Well, we didn't agree to it, so we went to Article 2.

Mr. Ball: I move to strike that as a conclusion of the witness, whether or not there was an agreement. Let him state what was said and done.

Trial Examiner Bokat: Yes, I will sustain the objection and strike the answer.

Q. (Mr. Walker continuing) Was there anything said about Article 2? A. Yes.

Q. What was said about it? [30]

A. I want to take a minute to look it over.

Trial Examiner Bokat: Yes. I will declare a five minute recess at this time, and give you such opportunity.

(Thereupon a short recess was taken, after which proceedings were resumed as follows:)

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: The hearing will come to order, please.

Mr. Walker: Will you read the last question and answer, please?

(Thereupon the last question and answer were read aloud by the reporter as above recorded.)

Trial Examiner Bokat: You may answer.

A. So far as Article 2 was concerned, Mr. Powell stated it was not agreeable to the company for the reason that he didn't want to sign any sort of an agreement that would force their employees into a union.

Trial Examiner Bokat: Was that what he said?

The Witness: That is what he said.

Q. (Mr. Walker continuing) Did any of the representatives of Local 206 say anything to that?

A. Well, yes. We asked them why they would not want to give preference to employing members of the union.

Q. Did Mr. Powell say anything to that?

A. Mr. Powell stated that that was not the company policy.

Q. Does that cover everything that was said relative to [31] Article 2?

A. I believe that was all at that time, yes.

Q. And what did you do next?

A. We went to Article 3, Section 1.

Q. What was said about Article 3, Section 1, if anything?

(Testimony of J. W. Estabrook.)

A. Mr. Powell said it was agreeable with them if we would change it.

Q. Did he say in what way to change it?

A. Well, that wasn't the way that they had their working agreement, or, rather, their work week mapped out.

Q. Did he indicate in what way the wording of Section 1, Article 3, did not conform to their work week?

A. That is right; I am not sure just what he said on that. We skipped it.

Q. And then you went to Section 2?

A. That is right.

Q. Was there anything said about Section 2?

A. Yes.

Q. What was it?

A. Mr. Powell wasn't in favor of that because the hours stated did not conform to the way they operated.

Q. Did any of the representatives of Local 206 say anything to that?

A. I don't remember whether we did or not.

Q. What did you do next? [32]

A. We went to Section 3.

Trial Examiner Bokat: Well, after Section 2, did any of the company representatives make any suggestions as to how it should be changed?

The Witness: No, sir.

Trial Examiner Bokat: All right. Proceed.

The Witness: I beg your pardon.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Well, what was said?

The Witness: They asked us to write it in conformity with the policy they had in effect, or the policy they have in effect.

Trial Examiner Bokat: What was the policy that was in effect?

The Witness: I didn't get around to that. Section 3, Article 3, they also objected to that.

Q. (Mr. Walker continuing) What was wrong with that? A. As it was written.

Q. Did they indicate in what way they objected?

A. For the same reason as Section 1, Section 2, —for the same reason as Section 1 and Section 2 of Article 3.

Mr. Ball: I will object to that unless it is made clear.

The Witness: That it didn't conform to the way they were then working the store, and that if we would change it to the way the company was operating at that time they would go for it.

Q. (Mr. Walker continuing) Did they indicate in any way whether [33] or not any parts of Section 3, Article 3, did not conform to their present work policy? A. I have no recollection.

Q. Did any representatives of Local 206 say anything to that?

A. Not at that meeting, no, sir.

Q. And then what did you do?

A. We went to Article 4.

Q. Was there any discussion on Article 4?

(Testimony of J. W. Estabrook.)

A. Yes.

Q. And what was it?

A. The first discussion was on the classifications, and Mr. Powell told me that the classifications were correct with the exception of one or two,—that the titles of the classifications were correct,—but that there was one or two classifications in there that we had in there which were wrong, where we were calling them by the wrong name. That is the only part of the article that they agreed to at that time.

Mr. Ball: I move to strike that, “that is the only part of the article we agreed to”, without specifying what the parts were.

Trial Examiner Bokar: Please state what he said with reference to that article?

The Witness: After discussing the classifications, we immediately discussed wages.

Trial Examiner Bokar: Did you take up each classification [34] in article 4?

The Witness: Yes, we took up each classification in Article 4.

Trial Examiner Bokar: What was it?

The Witness: And we were given an hourly rate for each classification, and after we had written them all down, Mr. Powell was asked if that was their offer, or if that was what they were paying, and Mr. Powell stated that that was what they were paying. He said in some instances they were paying more, but that was the minimum hourly rate established by the company for those particular jobs. However, he stated that there was, in some

(Testimony of J. W. Estabrook.)

instances, a higher rate of pay paid in certain classifications.

Trial Examiner Bokat: As to certain individuals?

The Witness: Yes.

Trial Examiner Bokat: Within the classifications?

The Witness: That is correct.

Trial Examiner Bokat: And I assume the hourly rate, when figured into a weekly salary, was less than what the union had asked for in the proposed agreement?

The Witness: That is correct.

Trial Examiner Bokat: What was the unions' reply to the company's proposal that the rate of wages then being paid be the minimum rate?

The Witness: My reply was that that wasn't any agreement, [35] that they merely stated what they were; and then we asked Mr. Powell if they would consider an increase.

Trial Examiner Bokat: What did he say.

The Witness: Definitely, no.

Trial Examiner Bokat: Proceed.

Q. (Mr. Walker continuing) Were there any other parts of Article 4 that were discussed at that time? A. Yes.

Q. Which part was that?

A. After the classifications, there is a clause before you get to Article 5.

Q. The last paragraph of Article 4?

(Testimony of J. W. Estabrook.)

A. Yes. And they did not agree to that.

Q. What was said about that?

A. They objected to the Board of Adjustments.

Q. Was there anything further said?

A. Mr. Powell stated it was objectionable to them, because it didn't conform to company policy.

Q. Did any of the representatives of Local 206 say anything about the last paragraph of Article 4?

A. No; not at that time.

Q. And then what did you do?

A. We went to Article 5.

Q. Was there any discussion of Article 5?

A. Yes. [36]

Q. What was it?

A. Mr. Powell stated that they did not conform with company policy.

Q. Did he indicate in what way it did not?

A. No, sir.

Q. Then what did you do?

A. We went to Article 6.

Q. Was anything said about Article 6?

A. About all that was said was that they didn't agree to it, for the reason that they thought that type of employee should not get into the union, or be covered by the union, I mean.

Q. Did any representative of Local 206 say anything to that?

A. Yes. We explained why that was in the contract, that that was the usual procedure and was common practice, in other warehouse contracts, or

(Testimony of J. W. Estabrook.)

in other warehouse agreements, where we had working foremen or supervisors, and that they were paid a certain amount over the regular scale, but that they they had to belong to the union.

Q. After that explanation, did any representative of Montgomery Ward & Company say anything further?

A. The same objection was made that they made before we explained it, that they didn't see where we should discuss those people in those classifications.

Q. Was there anything more said about Article 6? A. No, sir. [37]

Q. Then what did you do?

A. We went to Article 7.

Q. What was said?

A. They said to change it to six hours, instead of five.

Q. Did representatives of Local 206 say anything to that? A. Yes.

Q. First, was any reason given for the requested change?

A. Not that I remember, other than that was the way they were doing it at the present time, and that was the answer I got at that time, I think; I am not positive.

Q. What did any of the representatives of Local 206 say to that?

A. Oh, I don't remember; I don't think we said anything.

(Testimony of J. W. Estabrook.)

Q. What did you do?

A. We just went to the next article.

Q. Was there any discussion about Article 8?

A. Yes.

Q. And what was it?

A. Article 8 was objectionable in its entirety, and they suggested that it be changed, the same as Article 1, that the company would follow the law as to discharges and discriminations, and so forth.

Trial Examiner Bokat: You are referring to Section 1 of Article 8?

The Witness: I am referring to the entire article, Sections [38] 1, 2, and 3.

Trial Examiner Bokat: Sections 1, 2, and 3?

The Witness: No, let me see. Sections 1 and 2, rather. And then when we got to Article 3, they objected because that was not the company policy on physical examinations, and so on and so forth.

Q. (Mr. Walker continuing) Was anything said with reference to Article 13, as set out in Section 2 of Article 8 at that time?

A. Yes, but we skipped that. We discussed it from time to time, but we didn't really get into that until we got to Article 13.

Q. What next did you do?

A. We went to Article 9.

Q. Was there anything said about that?

A. Yes.

Q. What was said?

(Testimony of J. W. Estabrook.)

A. They objected to it, because it did not conform with company policy.

Q. Was there anything further?

A. No.

Q. Then what did you do?

A. We went to Article 10.

Q. Was there anything said about that?

A. I don't think there was a great deal of discussion on [39] Article 10 one way or the other.

Trial Examiner Bokat: You mean there was no objection to that particular one?

The Witness: Not that I remember; I don't think there was.

Trial Examiner Bokat: Proceed.

The Witness: We then went on to Article 11.

Q. (Mr. Walker continuing) Was there anything said about that? A. Yes.

Q. What was it?

A. Well, I will have to read the article.

Trial Examiner Bokat: Take your time.

The Witness: I mean, read it into the record, in order to explain.

Trial Examiner Bokat: All right, if that is your answer.

The Witness: (Reading)

“Article 11. Strikes: The union agrees not to engage in any strikes or stoppage of work. The employer agrees not to engage in any lock-outs. Any action of the employees leaving jobs for their own protection in cases of a legally

(Testimony of J. W. Estabrook.)

declared strike by some union directly working on the job, if said strike is sanctioned and approved by the Portland Central Labor Council, shall not constitute a violation of this clause of this agreement."

Trial Examiner Bokat: All right, now will you explain.

The Witness: They agreed to that in this way: Mr. Powell stated that they would agree to Article 11 if we would just [40] have the first sentence stated, making it read, "The union agrees not to engage in any strikes or stoppage of work."

Trial Examiner Bokat: What was the union's reply?

The Witness: We didn't agree to that.

Mr. Ball: I didn't hear that?

The Witness: We didn't agree to that.

Q. (Mr. Walker continuing) What did you do then? A. We went to Article 12.

Q. Was there anything said about Article 12?

A. Yes. Article 12 was objectionable because it didn't conform with company policy.

Q. Was there anything else said about that?

A. No, sir.

Q. Did you pass on then?

A. Yes, we passed on to Article 13.

Q. Was there a discussion about that?

A. Yes.

Q. What was it?

(Testimony of J. W. Estabrook.)

A. Well, we discussed the article. That calls for a "Board of Adjustment" to settle all disputes that might arise, but Mr. Powell stated that he had no particular objection to a Board of Adjustment, or to a Board of that kind, providing, if the decision of the Board of Adjustment was against company policy, they could not live up to it.

Q. Did Local 206 say anything to that? [41]

A. No, sir.

Q. What next did you do?

A. Well, that was the end of our meeting so far as discussing the wage scale was concerned. We had a general discussion that lasted for a few minutes after that.

Q. What next was said?

A. We discussed further meetings and where they would be held, and Mr. Towers,—I don't know whether I am allowed to say that in this meeting, or to make the statement that he made,—

Q. Go ahead.

A. He was one of the representatives of the union from Oakland. He asked Montgomery Ward & Company why they continued to call these "discussions" instead of "negotiations".

Q. How did that happen to arise?

A. Well, I don't know; I can't say why Mr. Towers asked the question.

Q. Had something been said before Mr. Towers spoke up?

(Testimony of J. W. Estabrook.)

A. No. Mr. Towers asked if he was to understand if these were "discussions" or "negotiations". Mr. Powell said it was just a figure of speech, anyway, and that he would rather call them discussions than negotiations.

Q. Who had been using the figure of speech during the discussions? A. Mr. Powell.

Q. Was there anything further at that meeting? [42]

A. I believe that is about all.

Q. Were you present at any further meetings with representatives of Montgomery Ward & Company at any place? A. Yes, I was.

Q. Where? A. In Oakland.

Q. About what was that with respect to the last meeting that you have just described?

A. I think it was just before Thanksgiving; I am not sure whether it was just before or just after.

Mr. Ball: I think I can tell you. November 25.

The Witness: I think that is right.

Q. (Mr. Walker continuing) Who were present at the meeting in Oakland representing the union?

A. There was Mr. Holmes and myself from Local 206; Mr. White, representing the Western Warehouse Council; Mr. Towers, representing the Oakland Warehouse Union; Mr. Cohn, Mr. Wood, and Mr. Nathan, representing the Retail Clerks' Local, and also the International; and there were several other fellows that I didn't know.

(Testimony of J. W. Estabrook.)

Q. Who represented Montgomery Ward & Company?

A. Mr. Powell and, I believe, this gentleman right behind Mr. Ball (pointing.) I am not certain.

Mr. Ball: Mr. Denecke.

Q. (Mr. Walker continuing) Mr. Denecke?

[43]

A. I am not positive whether he was there or not. Mr. Powell was the only one I knew. I knew there were other representatives, and I imagined they were locally from Oakland,—local men from Oakland. However, I have no way of knowing.

Q. How did that meeting start?

A. It started with a general discussion of the agreements.

Trial Examiner Bokar: When you say “agreements”, what do you mean?

The Witness: Well, it started out by us wanting to know what position Montgomery Ward & Company was going to take in these negotiations from then on.

Trial Examiner Bokar: Was the same proposed agreement discussed as a basis of negotiation, or were there others?

The Witness: Yes, it was.

Trial Examiner Bokar: So far as the union concerned, it was the same agreement?

The Witness: Yes, it was.

Trial Examiner Bokar: The same identical proposed agreement?

(Testimony of J. W. Estabrook.)

The Witness: That is correct.

Mr. Ball: May I interpose a suggestion that the spokesman in each case be identified?

Trial Examiner Bokat: Yes.

The Witness: The spokesman in the Oakland meeting was Mr. White and myself.

Trial Examiner Bokat: Who was the spokesman for the company? [44]

The Witness: Mr. Powell.

Q. (Mr. Walker continuing) And who was Mr. White?

A. Mr. White was the Secretary of the Western Council of Warehousemen.

Q. Was any suggestion made relative to the manner in which the form of agreement would be taken up? A. It was.

Q. What was that suggestion?

A. We wanted to know who we were supposed to negotiate with. At that time we made the suggestion,—I will have to relate our conversation the best I can remember it.

Q. Go ahead.

A. I made the statement, and I think Mr. White did, too, that we had tried to negotiate with Mr. Powell and Mr. Huddleston; I made the statement that we had tried to negotiate in Oakland, but we were not getting anywhere, and that we thought we were being stalled, that we had heard so much about company policy that we were getting tired of it, and we wanted to know what it was, if they had a

(Testimony of J. W. Estabrook.)

book on company policy, and, if so, we would like to see it, so that we could tell whether or not they had anything in there with reference to company policy, so that we would know better what to do. They didn't seem to have a book, or seem to be able to furnish us with a book. It appeared that they didn't have any company policy.

Mr. Ball: I move to strike that. [45]

Trial Examiner Bokat: That may be stricken.

Q. (Mr. Walker continuing) Was there a booklet, or anything in writing, furnished by you, or, rather, furnished to you by the company representatives which contained anything with reference to company policy?

A. Mr. Powell said they didn't have any.

Trial Examiner Bokat: This took place where?

The Witness: In Oakland, California.

Q. (Mr. Walker continuing) What else was said about company policy at that time?

A. I don't know; that was about the sum and substance of it, I think.

Q. Did Mr. Holmes take part in the meeting?

A. We took part in the discussion, all of us; we all took part in the discussion.

Q. Do you recall that he said anything, or what he said?

A. No; the only other conversation that I can recall was that Mr. White and myself volunteered to go to Chicago with Mr. Powell, if it was necessary, in order to negotiate our contract; we stated that

(Testimony of J. W. Estabrook.)

we wanted to talk with the people that we were to negotiate with, and up until then we had not been able to.

Trial Examiner Bokat: What did Mr. Powell say to that, if anything?

The Witness: I don't remember word for word; I think he said [46] that he would take that under advisement.

Trial Examiner Bokat: Did he make any representation that he had the right to bind the company, or did he indicate that he could not bind the company, or what was the situation?

The Witness: All I can give you is the conclusion that I drew.

Trial Examiner Bokat: I would rather not have that. I would rather have what was said.

The Witness: Then I would not be able to answer the question. The only thing I could say is, when we asked Mr. Powell for an answer, he never gave any.

Trial Examiner Bokat: Can't you state what was said?

Mr. Ball: I move to strike the last statement of the witness as a conclusion.

Trial Examiner Bokat: It may be stricken.

Did he make any specific answer as to who was authorized to bargain for the company?

The Witness: Yes.

Trial Examiner Bokat: And did he state that he was authorized to bargain for the company?

(Testimony of J. W. Estabrook.)

The Witness: Yes, but these questions, or these answers that he gave as to these questions I have testified to,—he always stated, or in the instances I gave you, that it was contrary to the company policy.

Trial Examiner Bokat: When did he tell you he had authority [47] to bargain for the company?

The Witness: I am not sure I can tell you when he first stated it. I know we asked him at the meeting in Oakland,—we asked Mr. Powell. That same question was asked many times in that same meeting, and he would first reply that he was representing the Board of Directors in Chicago, and then the next time when the question was asked he would state,—he would state various things. When certain matters were asked about in the agreement, or various questions asked him, he would answer by stating that those things were against the company policy. And then is when we volunteered to go to the people who would have the power to change the company policy.

Trial Examiner Bokat: What was his reply to that?

The Witness: He said he would take that under consideration.

Trial Examiner Bokat: Proceed.

Q. (Mr. Walker continuing) Did you ever get an answer to your suggestion to go to Chicago?

A. We never did.

Q. At any time did you relate to Mr. Powell

(Testimony of J. W. Estabrook.)

what had been said between yourself, Mr. Barr, Mr. Ball, and Mr. Heidinger in Chicago?

A. I did.

Q. Did Mr. Powell say anything to that?

A. No, sir.

Q. Was any particular part of the agreement discussed at the [48] Oakland meeting?

A. No, sir.

Q. Do you know whether or not Mr. Powell ever contacted Chicago relative to that situation?

A. I couldn't answer that; I don't know.

Q. Was there anything further at that meeting in Oakland?

A. No, I don't think so; there may have been some general discussion, but I don't remember what it was.

Trial Examiner Bokat: Did you discuss the proposed contract generally?

The Witness: We started to, Mr. Examiner, but we never got around to it.

Trial Examiner Bokat: For what reason, if you know?

The Witness: Well, we all got to arguing about company policy, and that is as far as we got.

Trial Examiner Bokat: Did Mr. Powell take any position with regard to what he had stated in the previous meeting held in Portland?

The Witness: Well, I don't quite understand you.

Trial Examiner Bokat: You have already stated

(Testimony of J. W. Estabrook.)

that you did have a meeting with Mr. Powell and several other representatives of the company sometime in October, 1940, where you discussed certain provisions of the contract.

The Witness: That is right.

Trial Examiner Bokat: And that the company took a certain [49] position with reference to each article?

The Witness: That is correct.

Trial Examiner Bokat: What was the position of Mr. Powell at the meeting in Oakland with regard to these particular provisions?

The Witness: The position of Mr. Powell was that he didn't have the power to change company policy.

Trial Examiner Bokat: You mean the position that Mr. Powell had taken, or the company had taken in October, 1940 was the same then?

The Witness: Yes, that is correct.

Trial Examiner Bokat: At the Oakland meeting?

The Witness: That is correct.

Trial Examiner Bokat: You say there was then quite an argument about the definition of company policy?

The Witness: Yes.

Trial Examiner Bokat: And then the meeting broke up?

The Witness: Yes.

Trial Examiner Bokat: Did you agree to meet again at the conclusion of that meeting?

(Testimony of J. W. Estabrook.)

The Witness: No.

Trial Examiner Bokat: Was Mr. Powell to give you any sort of a reply as to whether or not he was going to supply you with any more definite information?

The Witness: Mr. Powell did make the statement that he [50] would take up the advisability of the representatives of the union and himself going to Chicago.

Trial Examiner Bokat: Did he notify you about that, or, promise to notify you about that?

The Witness: I don't think so.

Trial Examiner Bokat: All right. This might be a good place to stop for lunch. I think, beginning tomorrow, we will take one hour for the noon adjournment. However, today, in view of the fact that counsel need a little more time to get various matters taken care of, I will allow an hour and a half for lunch. So we will adjourn at this time until 1:35 P.M. We will stand recessed at this time.

(Whereupon the hearing was recessed until 1:35 p.m.) [51]

Afternoon Session

(Whereupon, at 1:35 p.m. the hearing was continued pursuant to the taking of the noon recess, as follows:)

Trial Examiner Bokat: The hearing is now in session. You may proceed when you are ready, gentlemen.

(Testimony of J. W. Estabrook.)

Q. (Mr. Walker continuing) Mr. Estabrook, have you finished describing all that occurred at the Oakland meeting? A. Yes, I have.

Q. Now, following that meeting, did you meet with representatives of the respondent again at any time?

A. The next meeting that was held was on the 12th day of December,—I am not sure,—I think that was the date.

Q. Where was that meeting?

A. In Mr. Huddleston's office.

Q. Who represented Local 206 at that time?

A. Myself and Mr. Holmes.

Q. Who represented the respondent in addition to Mr. Huddleston, if he was there?

A. Mr. Powell and Mr. Barth.

Q. Was a form of agreement before the parties at that time? A. Yes.

Q. Were other representatives of other organizations present, in addition to representatives of Local 206? A. There was.

Q. What other organizations were there? [52]

A. There were several representatives of the Western Warehouse Council. Mr. Glazier and Mr. Lamberton; there was Mr. Langford and Mr. Dixon of the Clerks' Union; and Mr. Allen and Mr. Hicks of the Office Workers' Union; there was Gust and Anderson and Phil Brady, officers of the Portland Central Labor Council, also Mr. Landye, our at-

(Testimony of J. W. Estabrook.)

torney, and Jack Schlaht of the Teamsters Union. I believe that was all.

Trial Examiner Bokart: That meeting took place in Portland?

The Witness: Yes. And Mr. Ashe was present, not representing any labor union but representing the Federal Government, or some bureau of the Federal Government.

Q. (Mr. Walker continuing) How did that meeting open up?

A. Well, it had been called, and we opened the meeting up by stating that we were there to see if we could settle the strike and get an agreement negotiated.

Mr. Ball: May I suggest that he amplify that by indicating who said that?

Mr. Witness: I made that statement.

Q. (Mr. Walker continuing) Did you indicate who was representing the respondent?

A. Yes. There was Mr. Powell, Mr. Huddleston, and Mr. Barth; I am not sure whether anyone else was there. Denecke, yes, he was there.

Q. After your opening statement, what next took place?

A. I am sure I couldn't say. I furnished everyone with a copy [53] of the proposed wage scale and working agreement, and the same discussions on each article were entered into as had been previously discussed. I mean, it was the same type of meeting.

Trial Examiner Bokat: Was the same type of agreement, as you had presented before, known as Exhibit No. 3, discussed?

The Witness: Yes.

Trial Examiner Bokat: Had it been modified?

The Witness: No.

Trial Examiner Bokat: Was it the same agreement?

The Witness: Yes.

Trial Examiner Bokat: The same identical agreement?

The Witness: That is right.

Trial Examiner Bokat: All right.

The Witness: From there on, Mr. Ashe did most of the talking. Of course, everyone was asking questions. Mr. Ashe seemed to do most of the talking.

Q. (Mr. Walker continuing) What did Mr. Ashe say?

A. For one thing, he asked Mr. Powell if he would arbitrate.

Q. Arbitrate what?

A. The entire agreement.

Q. Was there any reply?

A. There was.

Q. Who replied? A. Mr. Powell.

Q. What did Mr. Powell say? [54]

A. He said he didn't have any objection, but if the arbitration award was against the company policy, they would not live up to it.

Q. Did Mr. Ashe say anything in addition to that?

(Testimony of J. W. Estabrook.)

A. Yes. He discussed several plans to try to bring the strike to a close. He asked Mr. Powell if they had any counter-proposal to make, and Mr. Powell said yes, they did.

Q. When did the strike begin?

A. December 7th, Saturday, 7:30 o'clock in the morning.

Q. What organizations were concerned in the strike?

A. The Warehousemen, the Office Workers, and the Retail Clerks.

Q. Now, coming back to the meeting. You mentioned Mr. Ashe's comment about a counter-proposal.

A. Yes.

Q. What was that about?

A. To call the strike off and to get the people back to work.

Q. Who made that proposal?

A. Mr. Powell.

Q. What else took place at that meeting?

A. Well, I don't think a great deal of anything after that took place. There was another meeting scheduled for the next day.

Q. How many meetings were held?

A. Altogether,— [55]

Q. At which Mr. Ashe was present?

A. There were three meetings held within a period of three or four days.

Q. All succeeding this first one that you have mentioned?

(Testimony of J. W. Estabrook.)

A. Yes. There was one the first day, and then I think there was two days before the next one.

Mr. Ball: If I may clarify that, perhaps we can have the record straight here. I will suggest it to the witness, and it may refresh his recollection.

Trial Examiner Bokat: Go ahead.

Mr. Ball: Friday the 13th, Saturday the 14th, and Monday the 16th.

The Witness: I believe that is right. Yes, that is right.

Trial Examiner Bokat: Was there a meeting on the 12th?

The Witness: No, it should have been the 13th.

Trial Examiner Bokat: Now, can anyone give a more accurate description of just what position Mr. Ashe holds?

Mr. Ball: I cannot give his exact title, but he is a member of Mr. Steelman's Conciliation Service of the Department of Labor.

Trial Examiner Bokat: All right.

The Witness: The meeting the next day was attended by about the same group, with the exception of Mr. Landye. I don't think Mr. Landye was at the second meeting. In fact, I am sure he was not. It was just a general discussion. We went [56] over the same ground we had the day before, with the exception that there seemed to be a lot of misunderstanding between Mr. Powell and Mr. Barth and Mr. Huddleston as to what was said the day before,

(Testimony of J. W. Estabrook.)

and at that time Mr. Ashe asked Mr. Powell if the company would bring in a girl, or if they had any objection to him bringing in a girl at the future meetings for the purpose of taking down everything that was said. Mr. Powell said he didn't think it was necessary to do that, and by not having someone in there to make a record of everything, we could broaden the conversation. Again the matter of arbitration was discussed,—and it was either at the second meeting,—no, I believe it was at the third meeting.

Q. (Mr. Walker continuing) You used the phrase “at the second meeting the parties went over the same ground as the day before”, or words to that effect. What did you mean by going over the same ground?

A. Well, we discussed arbitration and further negotiations, and so on and so forth.

Q. Was there a form of agreement there at the second meeting? A. There was.

Q. Was there any discussion on it?

A. Yes, but most of the discussion at the second meeting was on the Retail Clerks' agreement. However, I don't recall just what the discussions consisted of.

Trial Examiner Bokar: You mean, in addition to the agreement [57] submitted to your union, the Retail Clerks had also submitted an agreement?

The Witness: Yes, the Retail Clerks had also submitted an agreement, or a proposed agreement.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: You stated that at the meeting on December 16th, the parties went over the agreement clause by clause?

The Witness: No, I beg your pardon. We didn't go over all of it. We went half way through it, and the meeting broke up.

Trial Examiner Bokat: What happened in the meeting? Had the company changed its position in any way?

The Witness: No. they had not.

Trial Examiner Bokat: You mean, they took the same position they had in the previous meeting with regard to the various clauses of the agreement, and as to the proposed articles?

The Witness: That is correct.

Trial Examiner Bokat: All right. Proceed.

Q. (Mr. Walker continuing) Now, who appeared at the third meeting?

A. Well, the same group, with the exception of, —I don't think Glazier and Lamberton were down there at the third meeting. However, I am not sure about that. I am not exactly sure whether the representatives of the Portland Central Labor Council were there. However, the company has a record of that. [58] I think you could check that with Mr. Ball.

Q. Was there a form of agreement before the parties at the third meeting? A. Yes.

Q. And was it the same form as was used in the other meetings? A. Yes.

(Testimony of J. W. Estabrook.)

Q. Now, will you just go ahead and describe from that point on, what happened? Will you state what discussion took place?

A. There was not a great deal of discussion at the third meeting. The only discussion that I can remember was that Mr. Ashe made a few remarks to Mr. Powell, and, to be honest with you, I don't remember what they were; they were not of too much consequence, and I don't remember what they were. However, I recall Mr. Langford or Mr. Allen asked Mr. Powell a question.

Q. What was the question?

A. The question was, "Will you sign an agreement with the Warehousemen's Union with the same wages, hours, and working conditions as of the day before the strike?"

Q. Was that question answered?

A. It was.

Q. By whom? A. Mr. Powell.

Q. What was said? A. "No." [59]

Q. Did Mr. Powell say anything else relative to the question? A. Not that I can remember.

Trial Examiner Bokar: Didn't he say why?

The Witness: No, sir.

Q. (Mr. Walker continuing) Was the form of agreement discussed at that third meeting, if you recall? A. Yes.

Q. You mean the same as this one (indicating)?

A. Yes, Board's Exhibit 3.

(Testimony of J. W. Estabrook.)

Q. There was some discussion?

A. Yes, there was some discussion as to the union being willing to make some changes on some of these articles.

Q. Who proposed that matter? A. I did.

Q. And what was said?

A. Well, the only thing that was said at that time was the customary answer, that he always gave, it was against company policy.

Q. Can you indicate what portions of the agreement it was that the union suggested it would change the language of, to which you received the answer just now related?

A. In the first place, we talked about Article 2. The union was willing to consider a union shop instead of a closed shop, and the answer that I received from Mr. Powell was that the employer would not consider any kind of a union shop, closed [60] shop, or preferential hiring.

Trial Examiner Bokar: What do you mean by "union shop"? Was that clear to Mr. Powell?

The Witness: Yes, it was clear to Mr. Powell. It was described at great length, that the company would be privileged to hire anyone that they seen fit, without the consent of the union, with the stipulation that, after they had been employed thirty days or sixty days or ninety days, they would have to become members of the union. A closed shop is where they have to hire men through the union.

Trial Examiner Bokar: I understand. I just

(Testimony of J. W. Estabrook.)

wanted to know if you explained that to Mr. Powell?

The Witness: Oh, yes.

Q. (Mr. Walker continuing) What other portions of the agreement did Local 206 suggest be changed?

A. With respect to the wage scale we stated that all that we were asking,—we stated that we were not making an ultimatum with reference to the wage scale, but that we were willing to consider any counter-proposal they would give us; but the only counter-proposal they would give us was the wage rate that they were then paying, and we were not satisfied with that.

Q. When you mentioned counter-proposal, how did the question of counter-proposal come up?

A. I beg your pardon on that. If I said “counter-proposal”, I was mistaken. They didn’t make any counter-proposal. When [61] we discussed wages, they just read off a list of what the minimum was in all the classifications. It was not given to us as a form of counter proposal.

Mr. Ball: I move to strike that as the opinion of the witness. The word “counter-proposal” is susceptible of many meanings, and it goes to the heart of the issue in this case. I think that the witness should be asked to describe factually what was said and what was done, and what was offered by both parties.

Trial Examiner Bokar: That motion is granted.

(Testimony of J. W. Estabrook.)

Will you ask the question again of the witness, and ask him to state exactly what was said.

Q. (Mr. Walker continuing) Who read the wage scale to the persons present at that meeting?

Mr. Ball: May I object unless it is specified as to what time is referred to, and what meeting when the wage scale was read.

Trial Examiner Bokat: Yes, I think that is reasonable.

Mr. Walker: We are talking about the last meeting.

Mr. Ball: Well, let us have it specific.

Q. (Mr. Walker continuing) We are talking about the last meeting?

A. Yes. But they didn't read any wage scale then,——

Trial Examiner Bokat: You mentioned the reading of a wage scale. [62]

The Witness: The meeting I am referring to where they read the wage scale was the meeting when we met in October,—I believe it was October 12th, when we met with Mr. Powell, Mr. Barth, and Mr. Huddleston. That is the first meeting.

Trial Examiner Bokat: That is the first meeting, the one which you had in mind?

The Witness: Yes.

Trial Examiner Bokat: You are merely reiterating what you said before as to what took place?

The Witness: Yes.

(Testimony of J. W. Estabrook.)

Mr. Walker: I think the witness got into that when he explained the use of the term "counter-proposal".

Trial Examiner Bokat: I understand.

Q. (Mr. Walker continuing) Now, what else took place at the third meeting in December?

A. We also, in that third meeting in December, offered to submit all or any part of this agreement to arbitration.

Q. Did you get any reply to that?

A. Yes. I replied to that question before. Shall I repeat it, Mr. Examiner?

Trial Examiner Bokat: You said the desire to arbitrate was discussed at the third meeting. I think you said before it was the second meeting. Was it discussed again?

The Witness: Yes, it was discussed again; it was discussed at all the meetings, and Mr. Powell answered in the same way, [63] that if the arbitration was contrary to the company policy, the company couldn't carry it out.

Trial Examiner Bokat: Now, on this question of wage scales. Aside from the fact that at the first meeting Mr. Powell read the minimum hours or the rates for the various classifications, were wages generally discussed at each meeting?

The Witness: Not so much after that.

Trial Examiner Bokat: After the first meeting?

The Witness: The most discussion was at the meeting when Mr. Powell read the minimums.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Was the question discussed at any other meeting?

The Witness: Yes, it was.

Trial Examiner Bokat: I am interested in what was said.

The Witness: Mr. Powell made the statement that,—any time we discussed those wages, Mr. Powell made the statement that the company was in no position to grant any increases.

Trial Examiner Bokat: Do I understand from your testimony that the company took the same position they had the first meeting?

The Witness: Yes.

Trial Examiner Bokat: That they would pay the prevailing wages then in effect?

The Witness: Yes, and that they had no intention of making any wage increases. [64]

Trial Examiner Bokat: Who made the statement?

The Witness: Mr. Powell.

Q. (Mr. Walker continuing) Did Mr. Powell give any reason behind his statement?

A. No, sir. Well, just a moment. Mr. Powell did give a reason several times. I can't recall the meetings exactly, but Mr. Powell gave as his reason that they were paying as much as anybody else in the warehouse industry. Of course, there was a difference of opinion on that.

Trial Examiner Bokat: Just state what was said. The term "difference of opinion", of course, does not help us any.

(Testimony of J. W. Estabrook.)

The Witness: What he said was that they were paying just as high wages as anybody else in the city of Portland.

Trial Examiner Bokat: You said that he said that they couldn't pay any more?

The Witness: No, he didn't say that; he said they would not pay it.

Trial Examiner Bokat: All right. Was Mr. Ashe present at the third meeting?

The Witness: Yes, he was.

Mr. Walker: That is all.

Trial Examiner Bokat: You may cross examine.

Cross Examination

Q. (By Mr. Ball) When you were in Washington, Mr. Estabrook, how was it that you happened to meet Mr. Barr? [65]

A. I was out at the ball game.

Q. You just ran into him casually at that time?

A. Yes.

Q. Was Mr. Barr friendly in his attitude toward you? A. Oh, yes.

Q. And when you came to Chicago, how did you get in touch with Mr. Barr?

A. I called him from my hotel.

Q. Do you remember what he said in answer to your call?

A. Yes, to come right on over.

Q. At that time were you prepared to discuss a contract with Mr. Barr? A. Yes.

(Testimony of J. W. Estabrook.)

Q. You had a contract prepared at that time and ready to submit? A. I did.

Q. And you submitted a written contract identical with the one in evidence as Board's Exhibit No. 3 to Mr. Barr? A. That is right.

Q. Isn't it a fact that when you called on Mr. Barr, you said that you hadn't yet begun to write out the terms of the contract, and weren't really ready to present one?

A. Oh, no. Let us go back to the ball game. I had a copy of the contract in my pocket, and I kidded Mr. Barr by telling him there was no use going to Chicago, "I have got it in my pocket, and you can sign it now here in Washington, D. C.."

[66]

Trial Examiner Bokar: That was where?

The Witness: In Washington, D. C.

Trial Examiner Bokar: At the ball game?

The Witness: That is right.

Q. (Mr. Ball continuing) From the time the Warehousemen were certified, you had no discussions with anybody in Montgomery Ward & Company until you met Mr. Barr?

A. I wouldn't say that.

Q. Where did you have any discussions with anyone representing Montgomery Ward?

A. I think Mr. Huddleston and I had several meetings, but not specifically as to the contract.

Q. I am referring to the contract.

A. No.

(Testimony of J. W. Estabrook.)

Q. Do you recall how it was that you sent a copy of that contract to Mr. Huddleston?

A. No, I don't. I either mailed it to him or took it up there.

Q. Then it may well be a fact that you sent a copy to Mr. Huddleston through the mail?

A. Yes, I will stand on that. [67]

Q. Do you recall what date it was when you sent the contract to Mr. Huddleston? A. No, sir.

Trial Examiner Bokar: In addition to the one that you gave to Mr. Barr, you mailed another one?

The Witness: When I got back here, I must have done so; I think he got one.

Trial Examiner Bokar: Did you mail him one, or how did you give it to him?

The Witness: I either mailed him one, or he got one when I got back.

Trial Examiner Bokar: All right.

Q. (Mr. Ball, continuing) Do you recall learning that Mr. Powell was going to be in Portland along about October 22 to meet with Mr. Dixon?

A. Yes.

Q. Do you recall whether or not you telephoned Mr. Barth asking if you could see Mr. Powell when he was here then?

A. No, I don't recall that; possibly I did.

Q. Do you recall that on October 22, Mr. Powell did call you, when he was in Portland, about a meeting with Mr. Dixon, and in that telephone call you stated that you wanted to submit an agreement

(Testimony of J. W. Estabrook.)

and discuss it with Mr. Huddleston and him?

A. Yes.

Q. At that time, you mentioned your conversation with Mr. [68] Barr to Mr. Powell?

A. That is right.

Q. You recall that on that day Mr. Huddleston was in Denver, and that Mr. Powell suggested that you send a contract to Mr. Huddleston, or a copy of it?

A. I was told by someone that Mr. Huddleston was in Denver, but Mr. Huddleston was in possession of one of the contracts, or proposed contracts, before he went to Denver.

Trial Examiner Bokat: That is not the question.

Mr. Ball: I move to strike that answer.

Trial Examiner Bokat: Will you answer the question?

A. No, I didn't send a contract back to Denver.

Q. (Mr. Ball, continuing) I didn't ask you that. I asked you if Mr. Powell didn't ask you to send a copy to him?

A. No, I don't think so.

Q. What is your answer? A. No.

Q. Did Mr. Powell also suggest that you send a copy to him at Oakland?

A. Yes, I know that he suggested that I send a copy to Oakland, and I did.

Q. At that time, Mr. Powell suggested that you call Mr. Huddleston and arrange a time for a meeting when Mr. Powell could be back in Portland?

A. I believe that is right. [69]

(Testimony of J. W. Estabrook.)

Q. Do you recall that on October 25, you called Mr. Huddleston for an appointment to discuss the contract with Mr. Huddleston and Mr. Powell?

A. I don't recall the exact date. I know that I had that conversation.

Q. Mr. Huddleston called you back about October 26 to fix a date for such a meeting?

A. I believe he did.

Q. Do you recall that you were in San Francisco on November 6 and called Mr. Powell in Oakland?

A. Yes.

Q. Do you recall that? A. Yes.

Q. To fix a date? A. Yes.

Q. And that Mr. Powell suggested November 12 for that date?

A. I believe that is right.

Q. And that meeting of November 12 was the first meeting that you had to discuss a working agreement?

A. That is the meeting at which Mr. Towers, Mr. Holmes and myself were present.

Q. That is the meeting that you described earlier as being in October? A. No.

Q. It was November 12 that the first meeting was held? [70]

A. That Mr. Powell was there?

Q. Yes. A. Yes.

Trial Examiner Bokar: That is where the classifications of wages were discussed, and the agreement discussed, article by article?

(Testimony of J. W. Estabrook.)

The Witness: That is correct.

Q. (Mr. Ball, continuing) Now, if you will turn to your contract, Board's Exhibit No. 3. Do you recall any discussion of Article 1? A. Yes.

Q. In your discussion of Article 1, do you recall Mr. Powell suggesting that the statement set forth in Article 1 might well be put in the "whereas" form; that is, it might be put in a "Whereas" clause, and if that were done, an agreement might be reached on that?

A. Yes, he said that.

Q. And that that was an agreeable procedure with you? A. It was?

Q. You agreed that it might be put in any contract that might be drawn, that way?

Mr. Walker: You are speaking of November 12?

Mr. Ball: Yes.

Trial Examiner Bokar: You mean "Whereas" to be inserted therein in lieu of the statement? [71]

Mr. Ball: Making it a "Whereas" clause, instead of a statement.

The Witness: Yes, I know his explanation. We would agree to that, but he didn't want the wording that was in there at all.

Trial Examiner Bokar: That is what I am trying to find out.

The Witness: He didn't want the wording that was in there at all.

Q. (Mr. Ball, continuing) Do you recall the exact wording?

(Testimony of J. W. Estabrook.)

A. I don't recall the exact wording, not being a lawyer. He wanted to state in there that "Whereas the employer wanted to follow the law, or the letter of the law," or something to that effect; he didn't want the same article as that at all.

Q. You will recall, however, that you did discuss how this subject would be covered in the final agreement that might be reached between the parties?

A. Yes, I recall discussing that.

Trial Examiner Bokat: Do I understand that you gentlemen did not agree with the terminology of the phrase suggested by the company, or by Mr. Powell, with regard to that article?

The Witness: We didn't agree to the way they wanted it written.

Trial Examiner Bokat: But you did agree to the word "Whereas"?

The Witness: Yes, the word "Whereas", we agreed to that. [72]

Q. (Mr. Ball, continuing) You do remember that Mr. Powell stated that any contract that might be reached would contain substantially all that particular article?

Mr. Landye: The question of what the substance is is merely a legal conclusion of the witness.

Trial Examiner Bokat: Yes, I understand that. It might be disputed.

Mr. Ball: I will withdraw the question.

Q. (Mr. Ball, continuing) I will put it this way: Mr. Powell did make an offer of the form in

(Testimony of J. W. Estabrook.)

which it would be referred to in the final form of contract?

A. Yes, he did make an offer.

Q. You recall, with regard to Article 2, Mr. Powell stated the reasons why the company could not enter into such an agreement?

A. Yes.

Q. You recall that he made the statement that the company was willing to allow the men full freedom of choice as to whether or not they wanted to join the union?

A. Yes.

Q. And that the company would agree to no clause which would force an employee, directly or indirectly, to join the union?

A. Yes.

Q. And that the company could not accept the proposal as contained in this article? [73]

A. Yes.

Q. With regard to Section 1, Article 3, you will recall that Mr. Powell did say that the company would agree to a provision that covered the subject, something like this, "That no employee shall work less than four hours a day"? Do you remember that he agreed that that would be proper?

A. I don't recall.

Q. You don't recall?

A. No. But,—

Q. However,—

Mr. Walker: Let him finish the question, please.

Mr. Ball: Certainly.

A. I will tell you frankly, in answer to that

(Testimony of J. W. Estabrook.)

question, that the only recollection I have is that Mr. Powell did offer to go for that section, and the following two sections, provided they were changed, and he made this statement most definitely, if they were changed to coincide with what they were doing as a matter of company policy.

Q. (Mr. Ball, continuing) Do you mean to say that he used the words "as a matter of company policy" or "as a matter of present company practice"?

Trial Examiner Bokat: Is there any real distinction?

Mr. Ball: I don't know, but it is merely a matter of reiteration, in order to get at the fact.

Q. (Mr. Ball, continuing) You recall, with regard to Section 2, [74] you did have some discussion about the needs of the customers in the mail order department, requiring the plant to start as early as 5:30 in the morning?

A. Yes, I remember that.

Q. And Mr. Powell stated why the 5:30 starting hour would be necessary in order for the company to efficiently conduct its business?

A. I don't recall him saying that.

Q. But he may have, so far as your present recollection is concerned?

A. It could be.

Q. With regard to the discussion of Section 3 of Article 3, do you recall Mr. Powell stating that he had no objection to Section 3, except that we could not pay overtime on Saturdays, Washington's Birthday, or Armistice Day?

(Testimony of J. W. Estabrook.)

A. I don't recall anything like that.

Q. You recall that something was said differentiating Washington's Birthday and Armistice day from the other holidays?

A. No. The only thing I can recall is that there was an objection to it.

Q. So far as your present recollection is concerned, the matter could have been gone into?

A. Well, it could have been, I guess.

Trial Examiner Bokat: I want to know whether that is according to your recollection. You say that it could have been. [75] That doesn't help me.

The Witness: I didn't make any notes of the meetings at all, and so far as that is concerned, the company had a full opportunity to make a correct record.

Trial Examiner Bokat: I understand that, but I merely asked you if that was your recollection.

The Witness: My recollection is "No".

Q. (Mr. Ball, continuing) Do you recall how long this meeting took?

Trial Examiner Bokat: What meeting are you referring to?

Mr. Ball: The meeting of November 12.

A. A couple of hours; it might have been a little more than that. I think it was a couple of hours.

Trial Examiner Bokat: When you say "couple" do you mean two, or three, or four?

The Witness: A couple is two, according to my language.

(Testimony of J. W. Estabrook.)

Q. (Mr. Ball, continuing) Where was the meeting held?

A. In Montgomery Ward & Company, Mr. Hudleston's office, the third floor, in the afternoon.

Q. Now, turn to Article No. 8, Sections 2 and 3. Do you recall Mr. Powell stating that the company could not agree to put the final decision as to discharge of an employee to a third party, or in the hands of a third party, or anyone other than itself?

A. I am sure that he made that statement. [76]

Q. And he advanced as his reason why the company objected to that particular wording of that subject matter, the fact that it was necessary for the company to control the hiring and firing of employees?

A. He always insisted on that.

Q. And he therefore objected to the wording submitted by the union contract on that point, or the proposed contract?

A. No, he didn't do it just like that, Mr. Powell.

Q. Give us your best recollection.

A. My best recollection is that when we were discussing Section 3 of Article 8, and also Section 2, Mr. Powell said that he wanted to be the final judge of those matters.

Q. Pertaining to the discharge or hiring of employees?

A. He said that the Board of Adjustment would be all right, but if they disagreed with the company, they could not go along with the Board of Adjustment's decision.

(Testimony of J. W. Estabrook.)

Q. Because,——

A. ,—of the desire of the company to have the final say.

Q. As to Article 9, what is the substance of what took place on that article?

A. That is seniority, is it not?

Q. Yes. A. Well,——

Q. You had some discussion of that clause in the first meeting? A. Yes. [77]

Q. Do you recall more fully what was said on that particular clause?

A. Not word for word, but in general, he gave us the same answer that applied to all the articles.

Q. Do you remember that efficiency was discussed as the basis of the selection of an employee as against seniority?

A. To the best of my recollection, yes.

Q. And they talked about adaptability, promotability, and flexibility of employees and their age as being matters of consideration?

A. Yes, they discussed that as to present practice. They said that was the present practice.

Q. And that the sex or marital status of an employee might enter into the determination of the selection of an employee? A. I think so.

Q. There was a rather full exposition of what the company's practices were with regard to the selection of employees?

A. Yes, and they agreed to that article provided that it was changed to meet their present practice.

(Testimony of J. W. Estabrook.)

Q. Now, turning to this wage scale. Do you remember that Mr. Huddleston was present at the meeting on November 12? A. Yes.

Q. Do you remember Mr. Huddleston explaining the company's policy as to wages, that the company's policy was to pay as much or more than competition paid for the same work? [78]

A. That is what he told us.

Q. He explained that?

A. He explained their position.

Q. And did you discuss whether or not the company was doing that?

A. I certainly did.

Q. You disputed that?

A. I certainly did.

Q. And Mr. Huddleston explained that if the company was not doing that, that the wage scales would be changed to meet that policy, did he not?

A. No; I don't recall that. I recall asking if he would pay the same wages as his competitor paid.

Q. Do Sears Roebuck have a mail order house here in Portland?

A. Yes, they have a unit.

Q. Isn't it just a retail store?

A. Yes, but they do quite a bit of parcel post business.

Q. Sears have their mail order house in Seattle, instead of Portland?

A. I understand that they have a larger unit there, yes.

(Testimony of J. W. Estabrook.)

Q. You don't know whether Sears have comparable employees to all the employees of Montgomery Ward & Company in Portland?

A. They have some here.

Q. The bulk of the employees' work, in Sears Roebuck & Company is work done in the retail stores? [79]

A. They have warehousemen that don't get anywhere near the retail store.

Q. But their work is for the retail store?

A. They are working down there across the River, about a mile away.

Trial Examiner Bokat: What was Mr. Huddleston's reply when you asked him if he would pay the same wages as his competitors?

The Witness: We could have signed the contract at that time if he would have complied.

Trial Examiner Bokat: That is hardly the question.

The Witness: Well, he stated that they were paying as high as their competitors, but, of course, we disputed that.

Q. (Mr. Ball, continuing) The fact of the matter is, isn't it, that you were in touch with Mr. Glazier, the representative for the Western Warehousemen, about the Seattle situation, and closed shop there, were you not? A. Yes.

Q. In fact, wasn't there an organization, or a committee, of which you were a member, to handle

(Testimony of J. W. Estabrook.)

the unionization of Montgomery Ward & Company in the 11 western states?

A. I am an officer of the Warehousemen's Council.

Q. This was a specific committee? Isn't that a fact?

A. I believe there was one. I think that happened in Denver.

Q. Now, do you recall who was on that committee, Mr. Estabrook?

A. Mr. White was on it. [80]

Q. Mr. Glazier of Seattle was on it?

A. Yes, sir.

Q. Who else was on it? A. Myself.

Q. There were some others besides that, weren't there? A. Mr. Woxburg of Denver.

Trial Examiner Bokat: Does that have any connection with the issues here?

Mr. Ball: Yes, I think that it does, because they later desired to speak for these organizations, including the organizations in Portland.

Trial Examiner Bokat: All right.

Q. (Mr. Ball, continuing) You had occasion to keep in touch with what Mr. Glazier was doing with Sears Roebuck in Seattle in connection with your dealings with Montgomery Ward here?

A. Yes.

Q. Sometime in November there was a strike at Sears, was there not?

A. I believe there was.

(Testimony of J. W. Estabrook.)

Q. And as a result of that, Sears agreed to a closed shop? A. Correct.

Q. And that strike was called about the time the Christmas business was building up for Sears?

A. I don't know when the Christmas business was building up.

Q. But it was late in November? [81]

Mr. Landye: It seems to me that this is immaterial to the issues in this case. It is very interesting to know what happened at Sears, but I don't think that is pertinent to the issues here.

Trial Examiner Bokat: I think that I know what counsel is driving at. Have you anything to say, Mr. Ball?

Mr. Ball: I have this to say: you will notice in the record there is testimony that Mr. Glazier was present at some of the negotiations involving the Portland situation.

Trial Examiner Bokat: I understand, but an objection has been made to the Sears closed shop discussion and a contract being signed. I assume that your purpose is to show what the Union's idea was with reference to a closed shop for Montgomery Ward?

Mr. Ball: I have a somewhat broader purpose. I propose to show that some of these discussions with Sears were also brought in,—

Trial Examiner Bokat: (Interposing) I will let the answer stand at the present time, but I don't want to get into discussions of the Sears strike, or

(Testimony of J. W. Estabrook.)

what happened at Sears, because it has no relation to the issues in this case.

Q. (Mr. Ball, continuing) You recall that sometime during the last part of November, you and the other members of this committee to organize Montgomery Ward had a meeting in Los Angeles, California? [82]

Mr. Landye: There is no testimony in here that there is any special committee to organize Montgomery Ward & Company. Mr. Estabrook has testified that he is an officer of the Warehousemen of the Western States Council, but that was brought out with regard to a question that was asked him on cross examination by Mr. Ball; but there is no testimony in here except that leading cross examination as to the purpose of the committee.

Trial Examiner Bokar: I will let the question stand as it is, but lay a foundation.

Mr. Ball: May I suggest to the Trial Examiner that the purpose will be apparent, if I am permitted to proceed a little farther,——

Mr. Walker: Let me state, for the purpose of the record, that this testimony should be stricken upon the company's failure to show the relevancy, and I so move.

Trial Examiner Bokar: Well, it will be ignored if it doesn't have any connection, or considered stricken if it has no apparent connection with the issue.

Mr. Landye: May the record show that the

(Testimony of J. W. Estabrook.)

Union's attorney has a running objection to this entire line?

Trial Examiner Bokat: Yes, that may be shown.

Q. (Mr. Ball, continuing) You were aware of the publicity that was given in the *American Labor Citizen*, naming yourself as a member of the committee to organize Montgomery Ward? [83]

A. That is correct.

Mr. Walker: I will object to that upon the ground that it is absolutely immaterial to this issue. Further, I will object on the ground that the answer of the witness can be taken to pass upon the veracity or the accuracy of the statement in the paper. In other words, I have no objection to the answer, if the answer is in regard to the facts. However, here is an article that appears in the paper, and he is asking the witness to construe the accuracy or veracity of the statement contained in the paper, and I don't think that it is proper.

Trial Examiner Bokat: You said "yes"?

The Witness: Yes, my name did appear there.

Q. (By Mr. Ball, continuing) And your committee actually was formed for that purpose?

A. Well, the newspaper exaggerated it, as newspapers usually do.

Trial Examiner Bokat: Was there a special committee formed to organize Montgomery Ward?

The Witness: That is correct.

Q. (Mr. Ball, continuing) In the 11 western states that coincide with the jurisdiction of the Western Warehouse Council? A. Yes.

(Testimony of J. W. Estabrook.)

Q. And Mr. White, who was the spokesman for that committee in the meeting of November 25,—

A. Yes, he was the spokesman. [84]

Q. Mr. White was the spokesman for that committee in the meeting of November 25 at Oakland, California, you say? A. Yes.

Q. And Mr. White professed to be speaking on behalf of your Local and your organization, as well as the other members of this council in the meeting that was held on November 25?

A. No, I wouldn't say that.

Q. He did make that claim at the meeting?

A. He claimed that he was speaking for and on behalf of the Western Warehouse Council.

Q. And also stated that that included all the Locals in its jurisdiction?

A. Well, of course, those units would be included in it.

Q. And this was essentially the same committee that had been organized to bring about the unionization of Montgomery Ward? A. Yes.

Q. And he did profess to speak not only for your Local here in Portland, but for the Retail Clerks' Local and for the Office Workers' Local here in Portland?

A. I will have to answer that "yes", but not Mr. White. The Retail Clerks had three men in that meeting representing them.

Q. But it was a joint committee action?

(Testimony of J. W. Estabrook.)

A. It was a joint committee of A. F. of L. representatives, yes.

Q. Isn't it true that towards the end of November there was a [85] meeting of this committee in Los Angeles, California?

A. No, that is not true. I would like to explain that to you, that there was a meeting, but not that committee.

Q. There was a meeting as to which your activities, or in which your activities in Portland in submitting contracts to Montgomery Ward and the general situation with regard to Montgomery Ward was discussed?

A. Yes.

Q. And who was present at that meeting? Do you recall?

A. I do not. I could furnish you with a list. There was at least 75 people who were present; perhaps a hundred.

Q. Mr. Beck was present at that meeting?

A. Yes, sir.

Q. And publicity followed that meeting in the papers to the effect that a decision had been made to take economic action against Montgomery Ward & Company in the 11 Western States unless they signed up with the union?

Mr. Landye: May I have a running objection to this testimony. It is absolutely immaterial and has nothing to do with the issues here. This issue merely is concerned with the relationship between Montgomery Ward & Company and the union.

(Testimony of J. W. Estabrook.)

Now, what has gone on in an A F of L convention can have no bearing here.

Trial Examiner Bokar: The complaint alleges that the strike was called because of respondent's refusal to bargain [86] collectively. If it is a fact that it was called for some other reason, I don't know. I take it that it is subject to connection. The connection may be obvious,—I don't know. It is something that I will have to take, subject to a motion to strike, if it is not connected up.

Will you read the question, Mr. Reporter?

(Thereupon the last question was read aloud by the reporter as above recorded.)

Q. (Mr. Ball, continuing) Is that true?

A. Do you want me to answer it?

Trial Examiner Bokar: Go ahead.

A. Yes.

Q. (Mr. Ball, continuing) And did the publicity in the American Labor Citizen, and other labor papers, substantially describe what took place at that meeting in Los Angeles?

A. I believe it did.

Q. Now, at that meeting in Los Angeles,—

Trial Examiner Bokar: You have raised a question, unless they signed up with the union; by "they", do you mean Montgomery Ward & Company?

Mr. Ball: Yes, unless Montgomery Ward signed up with the Union.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: I just wanted to make that clear.

(Whereupon a document was marked as Respondent's Exhibit No. 1 for identification.)

[87]

Q. (Mr. Ball, continuing) I hand you what the reporter had marked as Respondent's Exhibit No. 1. I will ask you if you recognize what it is?

Mr. Landye: At this time, although it has not been offered in evidence, before any questions are asked by way of identification, I want to register my objection. I have seen the practice in many of these Board cases where such matter has come in through the back door, by being identified and described and testified concerning before any offer has been made.

Trial Examiner Bokat: I think you realize that the objection is premature.

Mr. Landye: Yes, but I have had some experience in these cases, where the evidence has come in through the back door, before the document has been offered.

Mr. Ball: Will you read the last question, please, Mr. Reporter?

(Thereupon the last question was read aloud by the reporter as above recorded.)

Trial Examiner Bokat: You may answer that question.

(Testimony of J. W. Estabrook.)

A. I don't see my name there.

Trial Examiner Bokat: Will you read the question back again? That is not the question.

(Thereupon the last question was again read by the reporter as above recorded.)

A. Yes. [88]

Q. (By Mr. Ball, continuing) Have you ever seen a copy of that before? A. Yes.

Q. Will you describe for the record just what it is?

A. That is a labor paper published in San Francisco. It is known as the Official Western Publication of the American Federation of Labor.

Q. Have you read the story that appeared in that paper about the concerted action against Montgomery Ward in the 11 Western States?

A. No.

Q. You didn't read it at the time that it appeared? A. No.

Mr. Ball: Will you mark this as an exhibit, Mr. Reporter?

(Whereupon the document hereinabove referred to was marked as Respondent's Exhibit No. 2 for identification.)

Q. (Mr. Ball, continuing) I hand you what the Reporter has marked as Respondent's Exhibit No. 2, and ask you if you know what that is?

A. Yes, that is another copy of the American Labor Citizen.

(Testimony of J. W. Estabrook.)

Q. As of what date? A. November 22.

Q. And Respondent's Exhibit No. 1 was a copy of the same paper for what date?

A. November 29. [89]

Q. I ask you if you have ever seen this particular paper before? A. This one, yes.

Trial Examiner Bokat: Referring to Respondent's Exhibit No. 2.

Q. (Mr. Ball, continuing) You do find your name in that particular article? A. Yes.

Q. And that article does actually describe the formation of this committee exactly?

A. I would like to read it to make sure.

Trial Examiner Bokat: You may have all the time that you want?

The Witness: That is it.

Trial Examiner Bokat: Now, listen to the question.

The Witness: I answered the question, Mr. Examiner. He asked me if it described the formation of this committee, and I said that it did.

Q. (Mr. Ball, continuing) Now, subsequent to November 22, when Respondent's Exhibit No. 2 was circulated, and November 29, when Respondent's Exhibit No. 1 was circulated, this meeting took place at Los Angeles of this committee?

A. Yes.

Q. And at that time, in connection with the subject matter of presenting demands to Montgomery

(Testimony of J. W. Estabrook.)

Ward & Company, the Sears Roebuck [90] closed shop contract at Seattle was discussed, was it not?

A. I have no recollection of that being discussed.

Q. But you were aware of it at that time, that Sears had such a contract at St. Paul?

A. At Seattle.

Q. At Seattle? A. Yes.

Q. And I submit to you that it is a fact, is it not, Mr. Estabrook, that the fact that Sears had made such a contract was considered in the formulation of the policies of this committee at Los Angeles? A. No, sir.

Q. Now, when the meeting of November 25 was held, do you remember who was present?

A. I remember most of our people. The only man that I can recall his name, was Mr. Powell; however, there were other representatives of the company there.

Q. Do you recall Mr. P. W. Harris, vice-president of Montgomery Ward & Company, being present?

A. Yes, I remember that his name was mentioned.

Trial Examiner Bokar: I note that the representatives of the Company and the Union have been checking the payroll. For the record, I will state that in an off-the-record discussion the parties had agreed that a check be made of the designation of the various employees and the membership cards

(Testimony of J. W. Estabrook.)
of the Retail [91] Clerks from the payroll furnished by the respondent. Now, I understand that a check has been made, so I will declare a recess of ten minutes at this time, in order that the parties may discuss it.

(Whereupon at this time a short recess was taken after which proceedings were resumed as follows:)

Trial Examiner Bokat: Proceed.

Q. (Mr. Ball, continuing) Mr. Estabrook, that Sears' strike which lasted a day at Seattle, occurred November 19, did it not? A. I don't know.

Q. Is that substantially the approximate date?

A. I don't know the approximate date. I know that they had a strike.

Q. That was prior to November 25 and prior to the meeting at Los Angeles?

A. I would have to check my records.

Q. Maybe I can refresh your recollection.

A. I will accept the newspaper clipping, or anything like that.

Trial Examiner Bokat: I don't know how important this is going to be.

Mr. Ball: Well, can we pass that for the time being?

Trial Examiner Bokat: Yes.

Q. (Mr. Ball:) I have a newspaper clipping somewhere on that. Now, to return to this meeting of November 25 in Oakland, Calif- [92] ornia. Do

(Testimony of J. W. Estabrook.)

you recall this meeting being held in one of the company offices? Or do you recall where it was held?

A. It was held in the Montgomery Ward building in Oakland.

Q. You don't recall the names of the representatives of the various labor unions who were present at that meeting?

A. Almost all of them. There were some representatives from some of the smaller locals around the Bay Area. I know them by sight, but I don't know their names.

Q. Now, at that time, the Portland contract was not the only one of which a copy was present at the meeting? A. No.

Q. There was a copy of the contract of the Retail Clerks at Oakland; isn't that a fact?

A. There were various contracts.

Q. There was an open shop contract clause in the contract that was submitted at Oakland, California?

Mr. Landye: The same objection. Just what materiality it may have, I am at a little bit of a loss to know, and I therefore want to object.

Trial Examiner Bokar: I would like to have the record show whether it is a fact whether there was a general discussion concerning proposed contracts not only with the Portland division, but with other divisions of the company. This witness has related a general conversation that took place, which, I

(Testimony of J. W. Estabrook.)

assume, not only affected the Portland store, but other stores of the [93] company as well; is that correct?

The Witness: Yes.

Q. (Mr. Ball, continuing) Do you recall that some discussion at that time took place with regard to the closed shop clause in that contract that I just referred to? A. Yes.

Q. And Mr. White had that contract and asked to have the company's acceptance of that closed shop contract? A. That is right.

Q. There was some discussion about some Retail Clerk's Union having made a general rule at some convention of theirs that all of their contracts had to contain a closed shop clause?

A. I don't remember what the Retail Clerks said on that particular question.

Q. But there may have been a discussion of that kind at that time?

Mr. Landye: All through the hearing here, counsel has asked questions of that kind which may leave an inference to the mind of the reader, or leave the impression that certain things did happen, although the witness has not testified to them.

It seems to me that that is highly improper, and that the witness should only testify as to the things that he knows something about, and counsel not put in his mouth the statement [94] that possibly something may have happened, leaving the inference that it did happen. I think that it is highly improper,

(Testimony of J. W. Estabrook.)

and when a man says he doesn't know, that should be the end of it, according to the rules of evidence.

Trial Examiner Bokar: If the witness states that it might have happened, and then we have some affirmative proof that it did happen, of course, any statement on the part of the witness would be of no value whatsoever. I don't want to be technical. If it might have happened, I am interested in knowing. However, I will let it stand as some indication, although it doesn't have any weight as positive testimony.

Let's proceed.

Mr. Ball: I think that there was a question unanswered?

Trial Examiner Bokar: Will you read it, Mr. Reporter?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

A. I don't know.

Q. There was considerable discussion at that meeting, was there not, with respect to a closed shop clause or a union shop clause, or variations of union preference clauses?

A. There wasn't any more discussion on that than there was on any other part of the contract. There was some discussion on it, yes.

Q. Do you recall that when this meeting started, Mr. White opened the discussion of the meeting of November 25 by saying [95] that this committee

(Testimony of J. W. Estabrook.)

represented the Warehousemen's Union and Retail Clerk's Union in the 11 Western States?

A. Yes.

Q. And he mentioned that they had been trying to organize Montgomery Ward in many localities?

A. Yes.

Q. And that he was discussing the entire situation relating to these localities?

A. That is correct.

Q. And that the meeting involved the situation in Portland, and that he was acting as spokesman for a committee with relation to the Portland contract as well as to other matters?

A. I believe that is correct.

Q. Do you recall that he made some statement in which he asked some general questions about the company's policy about the union shop or closed shop?

A. I couldn't answer that yes or no.

Q. Well, now, in the course of this meeting several times Mr. White threatened economic action against Montgomery Ward & Company if certain things were not done, did he not?

Mr. Walker: I will object to that as calling for a conclusion of the witness.

A. I don't recall any such statement.

Q. You recall that Mr. White talked about the closed shop clause of the Retail Clerk's contract which had five subdivisions [96] Subdivision A, B, C, D, and E, in it, and that he asked about, generally, all of the five subdivisions of the closed

(Testimony of J. W. Estabrook.)

shop clause? A. No, I don't remember that.

Q. That meeting lasted quite a while, did it not?

A. Yes, it did.

Q. And there were lots of discussions that you have not presented, which went on in that discussion?

A. Yes; that is right; there are some that I don't recollect, if they took place at that time.

Q. There are some, doubtless, that took place that you do not recall?

A. There is one that I testified to that is outstanding in my memory.

Q. You don't mean to represent to the Board, naturally, that you have testified to everything that occurred?

A. No, and you haven't asked me that.

Q. I will grant that.

A. I will answer any question that you ask me, that I can remember.

Q. I believe that. But, in so far as the questions that have been asked so far, they have not covered everything that was said, but only what you can recall? A. Yes.

Q. And you have not covered everything that may have been said [97] at the meeting of November 25? A. That could be very possible.

Q. Now, during this meeting at Los Angeles, do you recall exactly the date that it took place?

A. Not the exact date.

(Testimony of J. W. Estabrook.)

Q. Have you any records in your files that would indicate the date?

A. Yes, I have the exact date.

Q. And will you be prepared tomorrow to testify what the dates would be?

A. The reason that I wouldn't be able to give you the date was because the meeting lasted a week, and it covered a lot of things besides Montgomery Ward & Company.

Q. In the course of the meeting at Los Angeles, the question of whether or not the Teamsters generally in the 11 Western States would support the economic action against Montgomery Ward & Company was discussed, was it not?

A. Yes, it was discussed; it is a known fact that they would.

Q. In fact, it was more or less the decision of the meeting that they would get the support in case of economic action against Montgomery Ward, of the Teamsters?

A. Yes, that is right.

Q. Do you recall what date it was that Montgomery Ward's Oakland house was struck?

A. Not without referring to my file. [98]

Q. If I mentioned December 4,—

A. ,—I would say that you were right.

Q. And you doubtless learned, or had calls from Mr. White over the telephone about this time concerning the action taken at Oakland?

A. I read the newspapers.

(Testimony of J. W. Estabrook.)

Q. And Mr. White continued to represent your Local here in the negotiations which continued and were conducted in Oakland? A. Yes, he did.

Q. And you were informed, were you not, that there was a meeting in Oakland on December 6, at which Mr. White made promises that no action would be taken at Portland until further discussions were had at Oakland?

A. No; I don't recall any such statement as that.

Q. Didn't Mr. White call you and give you that information?

A. Mr. White called me and gave me some information, but it was not anything like that.

Q. Then Mr. White neglected to pass that on to you?

A. No information like that was given to me.

Q. Now, who did call the strike in Portland? Wasn't it the Retail Clerks who called the strike?

A. We all called the strike.

Q. Didn't you say to Mr. Brown on April 4, that you came into the strike to support the action of the Clerks?

A. The Clerks originally called the strike. [99]

Q. Your union didn't call the strike except to support the action taken by the Retail Clerks?

A. That is right.

Q. And you did call it to support the action taken by the Retail Clerks?

A. Well, not exactly, no.

Q. But you made that statement to Mr. Brown?

(Testimony of J. W. Estabrook.)

A. Not in just that many words. Their organization met ahead of ours, and they took strike action first; that is about all that it amounted to. We took strike action within the following 24 hours.

Q. Isn't it a fact that the explanation for the strike occurring at Portland on the 7th, instead of waiting for a meeting to be held in Oakland on the 7th, was because the Retail Clerks had called the strike, and they were not under Mr. White's jurisdiction?

A. I don't know what Mr. White told you.

Q. If Mr. White made such a statement, was he correct or not? A. He was correct.

Q. Didn't Mr. White at a meeting on November 25 state that he and the others present for the Union were speaking for the Retail Clerks' Union here?

A. The only person who made that statement was Mr. Nathan, their International Representative.

Q. That followed Mr. White's statement that they were representing [100] all of the Retail Clerks as the result of the meeting of the Western Warehouse Council?

A. Mr. White acted as spokesman for the Western Warehouse Council.

Q. Mr. White spoke for the committee?

A. No. Mr. Nathan spoke for the International Clerks' Association.

(Testimony of J. W. Estabrook.)

Q. If Mr. White did say at any time that he was speaking for the entire committee as sole negotiator, that is not the fact?

Mr. Walker: I will object to that as assuming facts not in evidence.

Mr. Ball: It will be shown.

Trial Examiner Bokat: I will sustain the objection.

Mr. Ball: I may have that reconsidered if I show the necessary basic facts?

Trial Examiner Bokat: Oh, yes.

Mr. Ball: Without the necessity of recalling Mr. Estabrook?

Trial Examiner Bokat: Yes.

Mr. Ball: I would like to have the record show that I will have the opportunity to put that in without the necessity of recalling Mr. Estabrook.

Will you read the last question, please?

(Thereupon the question referred to was read aloud by the reporter as follows: [101])

“Q. If Mr. White did say at any time that he was speaking for the entire committee as sole negotiator, that is not the fact?”)

A. That is not the fact.

Q. (Mr. Ball, continuing) You and Mr. White had some discussion, did you not, over the phone or otherwise, about whether to handle this matter jointly, sometime subsequent to the time you called the strike, or whether to handle it otherwise?

Mr. Landye: What does he mean when he says

(Testimony of J. W. Estabrook.)

“jointly”; does he mean jointly between the Warehousemen in Portland and the Warehousemen in Oakland, or jointly between the various unions, the Warehousemen, the Clerks and Office Workers?

Q. (Mr. Ball, continuing) Let me ask you this: Mr. White did make reference, to your knowledge, did he not, that he desired to have the negotiations for both Portland and Oakland centered at Oakland?

A. No, he did not. I made that statement.

Q. That you desired to have them centered at Oakland?

A. Yes.

Q. Under Mr. White's hands?

A. No, sir. I would like to explain that.

Q. Go ahead.

A. Mr. White and myself are the two chief officers of the Western Warehouse Council. If a controversy should arise regarding Montgomery-Ward, or Safeway Stores, or whoever the [102] case might be, and their main office was in Oakland or San Francisco,—that is, with their headquarters in San Francisco or Oakland, or their labor relations officers were there, or the men to conduct the negotiations were there, I would go there to represent the Local myself, or, if it was impossible to get away, I would ask Mr. White to do it for me. Then, vice versa, if Portland was the main office, and the same situation existed, that Mr. White couldn't come to Portland, he would ask me.

Q. Mr. White has in times past represented your

(Testimony of J. W. Estabrook.)

Local here in negotiations with companies whose headquarters or whose responsible officers for such problems are centered in California? A. Yes.

Q. What is the Western Warehouse Council?

A. The Western Warehouse Council is an organization created within the International Brotherhood of Teamsters having to do strictly with warehouse unions. Our office of the Western Warehouse Council is in San Francisco.

This Council functions throughout the 11 western states, through Mr. White's office, because he is secretary, and we meet there once a month to discuss ways and means of handling our problems.

Q. What is the Highway Drivers' Council?

A. That is another organization created within the International Brotherhood of Teamsters, dealing solely with over-the-road [103] operations in the United States.

Q. If either of those organizations,—have either of those organizations ever been selected by the employees of Montgomery Ward & Company to represent them for collective bargaining purposes?

A. Yes.

Q. How was the selection made?

A. The people that are under our jurisdiction in Portland have been told many times of our Western Warehouse functions, and how they work; and they have always voiced their approval of those matters.

(Testimony of J. W. Estabrook.)

Mr. Landye: Are you going to offer Respondent's Exhibits 1 and 2?

Mr. Ball: Yes.

Trial Examiner Bokat: Are you going to do that now?

Mr. Ball: I thought I would cross examine the witness first.

Trial Examiner Bokat: In some jurisdictions, they limit the offer of exhibits through their own witnesses. You can do it any time that you want, provided you have laid the proper foundation and the materiality and competency is shown.

(Thereupon a document was marked as Respondent's Exhibit No. 3 for identification.)

Mr. Landye: That is not permitted in the Local Rules.

Trial Examiner Bokat: I will do it, if counsel prefers to do it that way. [104]

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's Exhibit 3, and I will ask you if you know what that is?

Mr. Landye: Does counsel have any objection to my looking at it?

Mr. Ball: Certainly not.

A. Yes.

Q. (Mr. Ball, continuing) Will you tell the Examiner what it is?

A. This is a request from the secretary of our Western Warehouse Council, Mr. White, asking

(Testimony of J. W. Estabrook.)

Montgomery Ward & Company what they intend to do about meeting with our local organization as to negotiations, how they are going to take place, and when, and so forth, and telling them that it should be done by a certain time.

Q. You recognize Mr. White's signature to that letter, do you not? A. Oh, yes.

Q. And you knew that that letter was written at that time?

A. We instructed him to.

Q. The "we" being the committee that we have spoken of before? A. That is correct.

Trial Examiner Bokar: The Warehousemen's Committee?

The Witness: That is correct.

Q. (Mr. Ball, continuing) Now, turning to the meeting of [105] December 13 in Portland, let me ask you whether or not prior to that time you had or had not withdrawn authority from Mr. White to speak for the Portland Local at Oakland.

A. I don't know that there was any authority to withdraw. I don't understand the question at all.

Q. Had you at any time notified Mr. White in any negotiations he might be conducting at Oakland, that he was not to speak for the Portland Local?

A. No. Nobody ever gave him any instructions like that.

Q. Do you recall that at that meeting of December 13, Mr. Brady was present?

(Testimony of J. W. Estabrook.)

A. Yes, he was.

Q. You recall also that the first remarks made at that meeting were made by Mr. Brady, were they not? A. I don't know exactly.

Q. On behalf of the Central Labor Council?

A. He spoke on behalf of the Central Labor Council, yes.

Q. And then you stated, did you not, that your union, and all the unions present at that meeting, were particularly concerned with the matter of recognition?

A. No, I don't think that I made that statement.

Q. Did you at any time discuss whether your union had been recognized?

A. Yes. I had discussed that.

Q. And Mr. Powell at that meeting stated,——
[106]

A. (Interposing) Mr. Powell stated at that time and at any other time that he did recognize the union.

Q. Just a minute. Mr. Powell stated at that time that he would recognize your union in accordance with the certification of the National Labor Relations Board?

A. That is right. And I also asked him about the Clerks.

Q. What was the reply about the Clerks?

A. That they had written a letter admitting that the Clerks had a majority of the people.

Q. A majority of the employees? A. Yes.

(Testimony of J. W. Estabrook.)

Q. You say that he had written a letter to the Clerks? A. Yes.

Q. Do you know where it is?

A. No, but I imagine that Mr. Dixon has it.

Mr. Ball: Mr. Dixon, do you have such a letter?

Mr. Dixon: From the company stating——

Mr. Landye: Just a moment. Is he going to examine everybody in the court room?

Trial Examiner Bokat: Off the record.

(Discussion off the record.)

(Thereupon a document was marked as Respondent's Exhibit No. 4 for identification.)

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's Exhibit No. 4, and ask you if that [107] is not the letter that you mentioned as being written by the company to the Retail Clerks, to which you have just made reference? A. I believe it is.

Trial Examiner Bokat: The only difficulty we have with reference to offering exhibits in bulk is that it is hard to recall the ones on which proper foundations have been laid. For instance, as to Respondent's Exhibit No. 1, a proper foundation has not been laid, as the witness said that he had never read it, although he stated that he had seen it. When several exhibits are offered at one time, that is the difficulty that we run into.

Mr. Ball: I would be happy to offer at this time Respondent's Exhibits, 1, 2 and 3.

(Testimony of J. W. Estabrook.)

Mr. Walker: I object to the offer of Respondent's Exhibits 1 and 2 upon the ground that the respondent has not properly identified them. It lacks sufficient foundation to establish materiality or relevancy; and I also object on the ground that the contents of the article are incompetent, irrelevant and immaterial. That objection runs to respondent's Exhibit No. 1.

As to Respondent's Exhibit No. 2, I object to it on the ground that it is incompetent, irrelevant and immaterial.

Mr. Landye: I object to Respondent's Exhibits 1 and 2 on the ground that they are not the best evidence. They are merely newspaper items that are put in while the witness is on the stand, [108] and it is clearly beyond the best evidence rule. It is attempting to put in secondary evidence, gathered by a newspaper reporter, and I suggest that they ask the witness.

Mr. Ball: May I call the Examiner's attention to the fact that counsel for the union is simply reiterating or reinforcing the objections made by counsel for the Board; in other words, his objections are supplemental to the objections made by counsel for the Board. That goes to the matter of being subjected to a double-barreled prosecution, which, I submit, is a violation of orderly procedure.

Trial Examiner Bokat: If I recall the testimony of the witness correctly, I believe that a proper foundation has been laid with reference to Respon-

(Testimony of J. W. Estabrook.)

dent's Exhibit 2. Of course, the witness stated that what was contained in that particular article took place. I don't know what particular part of Respondent's Exhibit No. 2 you are offering. There are approximately six pages in the issue of the paper. Just what are you offering? Let us take one at a time. Referring to Respondent's Exhibit No. 2, what do you offer? Do you offer the entire paper, or a part of it?

Mr. Ball: I offer the entire paper, but if that is not admitted, then alternatively, I offer that portion on the first page which contains the *heading*, seven columns wide, together with the article relating to that headline on the first page, and wherever it appears on subsequent pages. [109]

The *heading* that I refer to is "A F of L ready to move on Montgomery-Ward."

I am offering that, and the article which follows that, and, also, the advertisement which appears separately, on page 4, addressed to "Every member and friend of organized labor in the 11 Western States".

Trial Examiner Bokar: I will rule first on the general offer, and I will reject the general offer of the entire newspaper. As to your alternative offer, in regard to the specific article offered, I believe that the witness testified that that meeting took place as set forth in that particular article. Is that correct?

(Testimony of J. W. Estabrook.)

The Witness: Yes, but the only thing is, Mr. Examiner, that the man that reported this didn't put it all in. He may have put too much in there, or he may not have put enough in there. I can't say that it is exactly what took place.

Trial Examiner Bokat: Is it substantially an accurate reflection of what took place at the meeting?

The Witness: Substantially, no.

Mr. Ball: I will object to that. The witness is changing his testimony.

The Witness: That is a part of what took place; this meeting was over a period of a week.

Trial Examiner Bokat: Does what is set forth here represent a part of what took place in an accurate way? [110]

The Witness: A part.

Trial Examiner Bokat: Is that correctly set forth?

The Witness: Fairly accurate.

Trial Examiner Bokat: What is the purpose of the offer?

Mr. Ball: Without exhibiting the purpose of the offer,—

Trial Examiner Bokat: Of course, without your statement, I am at a loss to know. However,—

Mr. Ball: (Interposing) It is offered for the following reasons: first,—and let these reasons apply to both the general offer and the offer of the specific portion,—that it has been shown that Mr. Esta-

(Testimony of J. W. Estabrook.)

brook is perfectly familiar with the fact that this was printed and caused to be read by the general public, and published and circulated by the American Labor Citizen, and that the said statement is correct.

The Witness: So far as the publishing of it, yes.

Mr. Ball: And this states facts which were made known to this respondent, matters more or less of common knowledge, which were known to this respondent prior to some of the meetings which were taking place, and they have a bearing upon the subject matter to be discussed and the contents and course of these collective bargaining sessions; third, that the events set forth in this newspaper, and the fact that the newspaper itself was circulated, bear directly upon the allegation that this strike was due to unfair labor practices, namely, the failure to bargain with the union represented by Mr. Estabrook. [111]

I will reserve the right to state further reasons later.

Trial Examiner Bokar: I will receive it in evidence. I frankly don't know what is going to develop yet. It may have some relevancy, and again, it may not.

(Whereupon the document heretofore marked as Respondent's Exhibit 2 for identification, was received in evidence.)

(Testimony of J. W. Estabrook.)

RESPONDENT'S EXHIBIT No. 2

American Labor Citizen

San Francisco, Friday, November 22, 1940

AFL Ready to Move On Montgomery Ward
Concerted Action
Being Formulated
In Entire West.

Teamsters, Warehousemen,
Clerks, Engineers And
Machinists To
Coordinate Efforts Against
Labor-Resisting Company.
Economic Action in
11 Western States to Start
As All Union Members Urged
To Discontinue Patronage.

(See page four)

San Francisco.—Continual stalling and a series of conferences that plainly indicate a definite anti-labor policy on the part of Montgomery Ward, national chain store company, together with active anti-labor effort of the company in most of its operations in the West, is about to bring economic action of coordinated AFL effort against the company in the 11 western states.

A committee representing AFL units concerned with store operation has been formed. This committee, at present fruitlessly attempting a solution

(Testimony of J. W. Estabrook.)

of the many and various problems instituted against labor by the hedging company, is formulating plans for united action in all points in the West in which the company operates. The committee represents the teamsters, warehousemen and retail clerks and has the active support of the engineers and machinists and western AFL office.

Committee Personnel

Personnel of the committee includes Joseph M. Casey, international teamster representative; T. A. White, secretary of the Western Warehouse Council; Russell Nathan, international representative of the retail clerks; George Towers, secretary of Warehousemen's Local 853 of Alameda County; Jack Esterbrook, secretary of Warehousemen's Local 206 of Portland, Oregon; Fred Dixon, secretary of Retail Clerks Local 1257 of Portland, Oregon; William Wood, president and business representative of Retail Clerks Local 47 of Oakland, California, and B. I. Bowen, secretary of the Seattle Joint Council of Teamsters.

The committee, representing as it does the entire teamster and clerk effort in the West, is indicative of the seriousness of this Montgomery Ward affair. The committee is authorized to act by the various internationals and a drastic program is being formulated to advise the company through economic action that the anti-labor merry-go-round idea that the company has established in its labor relation

(Testimony of J. W. Estabrook.)

policy has come to a stop and that the merry-go-round has broken down.

Every Point

During the past six months reports have been coming into the western office of AFL of anti-union pressure and practices of Montgomery Ward from practically every point of operation in the West. A company union in the Fresno, California, store; a seven months' picket line on the store at Pittsburg in California. Refusal to talk in Oakland, California, and in Portland, Oregon, where both the warehousemen and the clerks show a majority of employees. Subtle coercion of employees at Redding, Santa Rosa and Petaluma; trouble in Modesto and discouragement of unionization at Los Angeles, Marysville and many other California operations. Denver, Colorado, Nampa, Idaho, Tacoma, Washington, and other points in the West report difficulty in organizational effort with this company.

The meetings with the company in the West have been held with William Powell, their labor relations employee, who by his conciliatory delay tactics has given direct evidence that either he has no power to act for the company or that the policy of the company is being followed parrot-like by Powell.

(Testimony of J. W. Estabrook.)

To Every Member and Friend of Organized Labor
in the Eleven Western States!

For the Preservation of the Very Principles and
and Ideals of Organized Labor, It Is Important
That You

Do Not Patronize

Montgomery Ward

This National Chain Store Company Is Combating
Legitimate Organization in Practically Every
One of Its Operations in the Entire West.

They refuse to recognize majorities of clerks or
warehousemen.

They refuse to seriously discuss these majorities
and decently negotiate with union officials.

They are sanctioning "company unions" in many
points of operation.

They discourage unionization among their em-
ployes.

They refuse to sign unionized contracts.

They refuse to officially notify their employes
that they may join a union if they wish to.

Their entire labor relations policy is one of con-
ciliatory delay, thereby giving positive evidence
that they do not want unionization.

They handle nationally boycotted unfair merchan-
dise, despite the fact that they have been repeatedly
requested to cooperate with union workers who
make up the bulk of their customers.

(Testimony of J. W. Estabrook.)

AFL warehousemen, teamsters, retail clerks, engineers and machinists are about to take action against this labor-biased unfair firm throughout its entire operation in the eleven western states.

Nearly every point of operation in the territory reports difficulty with this concern. Reports of this nature are at hand from Portland, Oregon; Tacoma, Washington; Los Angeles, Oakland, Fresno, Modesto, Redding, Santa Rosa, Petaluma, Marysville, Pittsburg and other California cities; from Denver, Colorado; from Nampa, Idaho, and elsewhere.

In Justice to Your Fellow Workers and for the
Preservation of Your Own Union Principles you
Must Not Patronize This Unfair Firm!

Trial Examiner Bokar: Now, as to the advertisement which you offer, I am trying to determine its relevancy.

Mr. Ball: May I call the Examiner's attention to the fact that Mr. Estabrook stated that he knew it was circulated.

Mr. Walker: No, he said he knew that it was published.

Trial Examiner Bokar: I will accept the advertisement. I will overrule the objection. Respondent's Exhibit No. 2 will be received, only in so far as it contains the article appearing under the title "A F of L ready to move on Montgomery Ward"

(Testimony of J. W. Estabrook.)

and the advertisement that appeared in the newspaper to which reference has been made.

Now, with regard to Respondent's Exhibit No. 1?

Mr. Ball: May I have the privilege of asking a few additional questions?

Trial Examiner Bokat: I think that you had better.

Q. (Mr. Ball, continuing) Calling your attention to the headline of the particular article, "Deadline today."

A. Where does it say "Deadline today"? [112]

Q. Does that, as a matter of fact, refer to a deadline on that date?

A. Not so far as I am concerned. How could it be the deadline when the strike was not called until the 4th of December?

Trial Examiner Bokat: I am sure I don't know.

The Witness: Neither do I.

Q. (Mr. Ball, continuing) Do you know what is meant by the statement "Deadline today"?

A. I am sure I don't know.

Q. So far as you are concerned, the fact that there was a deadline set is not correct?

A. Not so far as I am concerned, in connection with the newspaper.

Q. What about the statement in the paper, "Teamster and Clerk Units in Northern California have already moved against the company at Redding, Denver, Colorado, Portland, Oregon, and other points in the West are poised and ready to act against the company". Is that true?

(Testimony of J. W. Estabrook.)

Mr. Landye: This is exactly what I had in mind when I objected to these exhibits being identified, and then testimony being taken on them or concerning them without being offered in evidence. It is simply throwing the exhibits in through the back door, and much of the matter is brought into the record without following the proper legal procedure. I think that it is time that some sort of procedure be established. That is [13] not a fair way to do it.

Mr. Ball: May I suggest again, on the matter of elements of fair procedure, that two parties objecting at once,——

Trial Examiner Bokar: (Interposing) I will make it clear that so far as union counsel is concerned, he has a right to participate in the proceeding; and, so far as the objection of union counsel is concerned, I think that the objection is a good one.

Mr. Ball: Do I understand that the objections of the Union are not the objections of the Board?

Trial Examiner Bokar: Absolutely. The Union has a separate status in this proceeding. Counsel for the union has a right to object for and on behalf of the Union, but not for the Board.

I am only accepting his objection on behalf of the Union.

Mr. Ball: Then, notwithstanding his objection, this exhibit remains,——

Trial Examiner Bokar: I have not ruled on Respondent's Exhibit No. 1.

(Testimony of J. W. Estabrook.)

Mr. Walker: Furthermore, if they are not in evidence, they are not in evidence.

Trial Examiner Bokat: We will come to that point. I think that the objection is correct. I want to get at the fact. I don't know whether that is going to have any bearing on the case. If it is going to be helpful, I want to let it in.

Mr. Ball: Off the record? [114]

Trail Examiner Bokat: Off the record.

(Discussion off the record)

Mr. Ball: I have withdrawn the previous question.

Trial Examiner Bokat: All right, put the next question to the witness.

Q. (Mr. Ball, continuing) Calling your attention, Mr. Estabrook, to the fourth paragraph in Respondent's Exhibit No. 1, relating to Montgomery Ward & Company, I will ask you whether the paragraph there set forth is substantially correct?

A. No, it is not; it is very misleading; it certainly is not in there right. The editor of this paper printed the article, and when he did it, he put it in as a misleading article; that is, it is misleading and does not tell the facts.

Q. Then would you say that Montgomery Ward & Company, reading this, assuming that it was a reputable publication, believing this, had received an erroneous impression?

Mr. Walker: I will object to that as calling upon the witness to pass upon the truth and accuracy of

(Testimony of J. W. Estabrook.)

the article; and, secondly, to call upon the witness to determine what is going on in the minds of other people.

Trial Examiner Bokat: Yes, it is purely conjectural. I will have to sustain the objection to the question in that form.

Mr. Ball: I will let the record stand on that one.

Trial Examiner Bokat: All right. If it is the respondent's position, Mr. Ball, that the Company, because of these newspaper [115] articles, adopted a certain attitude, or were led to believe certain things, of course, that would be an element of defense. You have not stated the position of the respondent. I don't know what the position of the respondent is.

Mr. Ball: May I state this to the Examiner: that in the trial of any lawsuit it is necessarily true, in the examination of one witness there is not before the Examiner and before Counsel all of the record that will be brought out in the examination of others, but in an orderly procedure, it seems to me that facts that should be brought out in the case, which pertain to relevant matters, should be permitted, so that counsel could develop his story in an orderly way.

Trial Examiner Bokat: I don't intend to limit you unfairly. I merely want to understand your position, and what you are getting at. If I see your point clearly, I am going to permit you to go ahead. I don't want at any time to appear to be arbitrary.

(Testimony of J. W. Estabrook.)

I am here to protect the rights of everybody, and I want to get the facts fairly and squarely. That is my position.

Mr. Ball: We all concur in that. Do I understand that the exhibit is excluded both as to the specific article and as to the entire paper?

Trial Examiner Bokar: I have not ruled on it yet.

Mr. Ball: I offer the paper for what it states, and also the article specifically mentioning the respondents in that paper.

Mr. Walker: I renew my objection. [116]

Mr. Landye: Counsel for the Union object to the paper on the same grounds that they objected before, and, for the further reason that the best evidence of the meetings, if they can be secured, would be the minutes.

Trial Examiner Bokar: I am afraid that I will have to sustain the objection, without reading it, because the witness has testified that it does not fairly reflect what took place at that meeting. Am I correct?

The Witness: That is correct.

Trial Examiner Bokar: Inasmuch as he made that statement, I don't see how I can possibly accept that article. You may, Mr. Ball, want to withdraw the offer.

Mr. Ball: I shall probably renew it; I don't wish to withdraw it.

Trial Examiner Bokar: I mean, at this time.

(Testimony of J. W. Estabrook.)

I will refuse respondent's exhibit No. 1, and ask that the reporter mark it as a rejected exhibit.

Is there any objection to Respondent's Exhibit No. 3?

Mr. Walker: No objection.

Trial Examiner Bokat: It will be received and marked in evidence as Respondent's Exhibit 3.

RESPONDENT'S EXHIBIT No. 3

Western Warehouse Council

400 Brannan Street—San Francisco, California
Garfield 1074

Officers

President	Vice President
A. C. Fortey	W. L. Glazier
Local 595	Local 117
Los Angeles, California	Seattle, Wash.

Secretary-Treasurer

Thos. White
Local 860
San Francisco, Calif.

Trustees

H. L. Woxberg	A. J. Ruhl
Local 13	Local 334
Denver, Colo.	Spokane, Wash.

(Testimony of J. W. Estabrook.)

Affiliated With

American Federation of Labor

Western Conference of Teamsters

Joint Councils in Eleven Western States
and Canada

November 7, 1940

Mr. Powell

Montgomery Ward Company

29th Avenue & 14th Street

Oakland, California

Dear Sir:

The Western Warehouse Council representing fifty-eight local Unions in the eleven western states in a meeting in San Francisco on November 6, 1940, discussed the Montgomery Ward Company situation in this territory. Our organization, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has for some time attempted to organize the workers coming within our jurisdiction and employed by the Montgomery Ward Company.

In the cases of Portland, Oregon and Oakland, California this organization has been very nearly completed. In the case of Portland the National Labor Relations Board election has designated our local Union #206 as the bargaining agent for these people. Despite the results of this vote and despite the rights of the workers involved to be represented

(Testimony of J. W. Estabrook.)

by our local Union in this locality the firm, through your office, has up to the present time refused to sign an agreement for the wages, hours and working conditions of these people.

We therefore wish to advise you, as legal representative of the firm, that the Western Warehouse Council will on November 15, 1940, take economic action against the firm of Montgomery Ward and Company in all of its operations west of Denver, Colorado unless labor disputes with Mr. Jack Estabrook of Portland, Oregon, Mr. George Towers of Oakland, California, Mr. Arthur Fortey of Los Angeles, California, Mr. A. Ruhl of Spokane, Washington, Mr. H. Woxberg of Denver, Colorado, Mr. Paul Berg of Martinez, California and Mr. George Stokel of Sacramento, California, are settled to the satisfaction of our organizations on or before that date.

Our individual local Unions have reported a great deal of intimidation and coercion on the part of the company towards members of our locals employed by the firm.

We desire to advise you that this united action is being taken because of the actions of your petty executives in the districts mentioned. Our office in San Francisco will be glad to sit down with you before the fifteenth of November to discuss anything you may have in mind if you do not desire to forestall the action which I have been instructed to advise you of. I may be contacted at GARfield 1074,

(Testimony of J. W. Estabrook.)

400 Brannan Street, San Francisco, and will be available there from now until November 15.

Very truly yours,

THOMAS WHITE

Sec'y-Treas.

An Affiliate of the International Brotherhood of Teamsters.

Nov. 8, 1940.

TW/jk

OEU-21320

AFL-155

Q. (Mr. Ball, continuing) Turning to the meeting of December 13, Mr. Estabrook, Mr. Glazier of Seattle was not present at the meeting here in Portland? A. Yes, he was. [117]

Q. That is what I thought I asked. He was present? A. Yes, he was.

Q. And at that time, he stated that Sears Roebuck in Seattle had signed a union shop contract?

A. Yes, he did.

Q. And he stated that he thought that Montgomery Ward should do the same as Sears Roebuck?

A. I don't know whether he stated it or not.

Trial Examiner Bokat: That is what you wanted?

The Witness: How is that?

Trial Examiner Bokat: You were asking for a closed shop from the respondent?

(Testimony of J. W. Estabrook.)

The Witness: I will have to answer that by way of explanation. We would like to have one. However, we would listen to their proposal.

Q. (Mr. Ball, continuing) Mr. Estabrook, I hand you Respondent's Exhibit No. 5, and I will ask you if you know what that is?

A. That is an advertisement out of a newspaper.

Q. Do you recall having seen that advertisement in the newspaper approximately the date indicated by the top notation at the head of the exhibit?

A. Yes, I remember seeing a similar one.

Q. You had read that advertisement prior to attending the meeting of December 13, had you not? A. Yes. [118]

Mr. Ball: I offer Respondent's Exhibit 5.

Mr. Landye: Can't we have a foundation of who, when, and why?

Mr. Walker: There is no foundation laid.

Trial Examiner Bokat: Whether the union authorized it or caused it to be inserted.

Q. (Mr. Ball, continuing) You recall that the ad was run in the Oregon Journal, December 9, 1940? A. No, I don't.

Q. Do you recall that an ad was run identical with that in all the Portland papers on or about that date?

A. I don't know whether it was in all the Portland papers.

Q. You say you don't recall there was an advertisement similar to that in the Portland papers?

A. I recall an advertisement like that.

(Testimony of J. W. Estabrook.)

Q. Prior to the meeting of December 13?

A. Yes.

Q. And you were aware that the company had caused this statement to be published?

A. I took it for granted that the company had put it in there. We didn't.

Mr. Walker: May I state an objection? I object to that on the ground that it is a self-serving declaration, no foundation having been laid; and, furthermore, there is no showing of any connection between the matter herein contained and the matters at issue in this case. [119]

Trial Examiner Bokat: The witness said he read it, and I will accept it for what it is worth. It may be material, or it may not be.

(Whereupon the document heretofore marked as Respondent's Exhibit No. 5 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT No. 5

The Oregon Journal—December 9, 1940

Montgomery Ward & Company's Retail Store and Mail Order House in Portland are being picketed.

This is the result of the refusal of Wards to agree to a closed shop. No dispute exists as to wages or hours.

(Testimony of J. W. Estabrook.)

Q. (Mr. Ball, continuing) Again, referring to the meeting of December 14, you stated, did you not, or asked if the respondent would be willing to accept the agreement that Sears Roebuck at Seattle had made? A. I think that I did, yes.

Q. And do you recall what Mr. Powell said in answer to that inquiry?

A. No, I don't. It could not have been "yes", or we would have signed it.

Q. He pointed out, did he not, that that contract contained a provision for a union shop or a closed shop? A. I think so.

Q. And he restated at that time the company's objection to it? A. That is right.

Q. Do you recall that at that meeting of December 14, both you and Mr. Dixon brought up the matter of wages and made the claim that we were not paying the prevailing wages?

A. I don't believe I made that claim. I asked what they wanted to do about these wages here.

[120]

Trial Examiner Bokat: Referring to Board's Exhibit 3?

The Witness: Yes. There was some discussion on the differential between industries of a like nature. For instance, Sears Roebuck, Meier & Frank, J. C. Penney and Montgomery Ward. Montgomery Ward doesn't pay anywhere near what these people pay.

Q. (Mr. Ball, continuing) That was the statement that you made in the course of the meeting?

A. Yes.

(Testimony of J. W. Estabrook.)

Q. And that statement was denied by the representatives of the company? A. Yes.

Q. And there was a disagreement between you on that fact? A. I believe so.

Q. And at that time, it was open to you to bring up evidence of higher wages paid by other firms? A. No, I don't think there was.

Q. At least, you were not told not to?

A. I think it died down by the time that I offered to bet something that they paid less than the others.

Q. But you have not answered my question?

A. No; that is about all that there was to it.

Q. Now, at the meeting of December 16, there were, in fact, three contracts presented to the respondent?

A. The Office Workers, the Clerks and ours.

[121]

Q. (Trial Examiner Bokar) What do you mean by presented?

Mr. Ball: I mean by that, there were three contracts discussed at that meeting.

The Witness: There were three contracts in the hands of each man at that meeting.

Q. (Mr. Ball, continuing) That meeting was held where, Mr. Estabrook?

A. In Mr. Huddleston's office.

Q. Do you recall what the settling of that meeting was? A. You mean those present?

(Testimony of J. W. Estabrook.)

Q. I mean whereabouts; was it a large, or a small group, or where did you meet?

A. In Mr. Huddleston's office.

Q. You sat around a table? A. Yes.

Q. And pencils and papers were provided to each one? A. Yes.

Q. And each person had a copy of each contract to be discussed? A. Yes.

Q. In fact, each one of those contracts was discussed? A. That is right.

Q. You opened the meeting of December 16, did you not, with the request that you go over the Warehouseman's proposal first, section by section?

[122]

A. I believe that I did.

Q. And you stated, did you not, that the provision for a union shop was essential?

A. Yes, I think that I made that statement. However, up to that time, and in that meeting,—I am sure that it was in that meeting, we made an offer to accept a union shop, or consider any counter proposal to the union shop.

Q. But you did state, did you not, Mr. Estabrook that your practice was that you would insist on having something in the way of some preferential treatment for the members of your organization?

A. Let me make this clear in order to answer that question: that had been stated many times, that we were not demanding a union shop, or a closed

(Testimony of J. W. Estabrook.)

shop, but that we were asking for some sort of union preference.

Q. But the word "closed shop" was used by Mr. Powell, referring to some sort of a union preference?

A. The only time I heard it used was by Mr. Powell, when we were discussing some of these demands.

Q. You did understand that he objected to any clause under which employees would be forced to join the union by the management?

A. Not necessarily.

Q. Let us make that clear. All through the negotiations, you demanded, as one of the minimum requirements, some sort of union [123] preference in the hiring and selection of employees?

A. That is one of them.

Q. That is one of the minimum demands?

A. No. We were more interested in wages than closed shop.

Q. And your position on the question of wages was that there should be some substantial increase in the wages?

A. Certainly.

Q. You wanted some substantial increase in wages, and some form of preferential treatment of union members?

A. Is that unusual?

Q. I am not asking you that. Isn't that a fact?

A. That is right.

Q. And that is the position that you consistently took?

(Testimony of J. W. Estabrook.)

A. As a believer in unionism, I couldn't very well take any other.

Q. And you stated that your union would not be prepared to consider anything else?

A. Oh, no. Along about that time, we asked Montgomery Ward if they would consider the agreement if we quit discussing the closed shop and the union shop article.

Q. But you still wanted some increase in wages?

A. We wanted seniority, we wanted the starting time changed, and we wanted vacations; in fact, we offered to sign an open shop agreement.

Q. What do you mean by "open shop"? [124]

A. We asked Mr. Powell if he would sign an open shop agreement, and he said "No".

Mr. Ball: I move to strike the answer as not responsive. I refer to the question "What do you mean by 'open shop'." I move that the answer be stricken.

Trial Examiner Bokst: Let us have the last question and answer, to determine whether or not it was responsive.

(Thereupon the question and answer referred to were read as follows:

"Q. What do you mean by 'open shop'?

"A. We asked Mr. Powell if he would sign an open shop agreement, and he said 'No'."

A. (Witness continuing) By "open shop", I mean an employer accepts no responsibility to see whether the employees join a union.

(Testimony of J. W. Estabrook.)

Q. (Mr. Ball, continuing) But the union included in the open shop contract a clause relating to seniority?

A. Yes, an increase in wages, arbitration, and so forth.

Q. And arbitration? A. Yes.

Q. Now, on this matter of arbitration, which you say was discussed at several of these meetings, the point was simply made by Mr. Powell that if the arbitration involved a decision on a matter of management policy by a third party, to that extent it would not be acceptable? [125]

Wasn't that the position that Mr. Powell made clear to you?

A. It just didn't sound like that. I myself asked Mr. Powell if he would accept arbitration, and I named a few local people: judges, the Mayor, and in fact, I even went to the extent of mentioning some employers as arbiters. He said that would be acceptable providing the decision was not against the company policy.

Q. In other words, he felt that in matters where company policy was concerned, that should not be submitted to the decision of an outside party?

A. Yes, but if that was the case,—

Q. That was what he said?

A. Yes. But everything was against company policy.

Mr. Ball: I move to strike that statement.

Trial Examiner Bokar: All right, strike it.

Mr. Walker: I think that the witness has a

(Testimony of J. W. Estabrook.)

right to explain his answer. Simply asking a witness to answer a question "yes" or "no" does not adequately cover it.

Trial Examiner Bokat: I will let you cover it on redirect.

Q. (Mr. Ball, continuing) Turning to Article No. 11. You recall that Article 11 was discussed at this meeting of December 16, was it not?

A. No, I don't recall that being discussed at the December 16 meeting. The biggest discussion we had on that was November 12. [126]

Q. Well, turning then to the meeting of November 12, you will recall that Mr. Powell said that he had no objection to the second sentence of that paragraph?

A. No. That was the big joker. He didn't want to include the company. He just wanted it included in there that we agreed not to engage in any strikes, but he didn't want the company to agree to anything. He just wanted the first one in there.

Q. You will recall that Mr. Powell stated that a lockout on the part of the company would be an unfair labor practice, in any event, and that that matter was covered by the National Labor Relations Act?

A. Yes, we heard that.

Q. His position on that was that that was just a matter covered by law?

Mr. Walker: I will object to that as calling for a conclusion of the witness.

Q. (Mr. Ball, continuing) Didn't Mr. Powell

(Testimony of J. W. Estabrook.)

state that that was a matter which was covered by the National Labor Relations Act?

A. No, he didn't state it that way.

Q. How did he state it?

A. Well, I don't recall it, but he didn't state it the way that you have stated it.

Q. He did discuss that the National Labor Relations Act bore upon that sentence? [127]

A. I believe he did, yes.

Q. Do you recall that he raised the question about the third sentence, that it made the entire clause inconsistent? Do you recall that he stated that it made the entire clause inconsistent if the third sentence was left in? Did he make that statement to you?

A. I don't remember him making that statement to me.

Q. Do you recall, going back to the meeting of December 16, that section 11 was discussed at that time and that Mr. Powell stated or asked you whether the Union was willing to insert after the words "some union" in line 4, "other than the Warehousemen's Union, Local 206"?

A. I don't remember him asking me any question like that.

Q. Do you recall Mr. Holmes stated an objection to any modification of that sentence with any such language?

A. You will have to ask Mr. Holmes that; I don't remember.

(Testimony of J. W. Estabrook.)

Q. What happened after you finished discussing the various provisions of that contract? Do you recall what was said next? A. No.

Q. Was the office workers' contract or the Retail Clerks' Contract next considered?

A. Yes, I think there was some discussion on it; not a great deal.

Q. Do you recall that the parties then took in their hands the [128] contracts of the Office Workers, and that those contracts were then used as a basis for discussion?

A. Yes, I believe they did.

Q. Do you recall that this meeting lasted some time on December 16? A. Yes.

Q. How many hours do you estimate that it lasted? A. I think it was all morning.

Q. Do you recall that at any time there was a request on the part of the company to terminate those discussions?

A. The only request,—I don't recall that, no. But I do recall a request that the company made; however, it didn't have anything to do with that.

Q. As a matter of fact, who left the meeting first on December 16? A. The Federal Conciliator.

Q. Who was the next one?

A. I don't know; we all left. He just put his stuff together.

Q. You all were picking up your papers, and then you said something to the effect that "We have now negotiated these contracts", did you not?

(Testimony of J. W. Estabrook.)

A. No, Mr. Ashe, the Federal Conciliator, gathered up his papers and said, "We are getting nowhere. Let's go."

Q. You deny that you made that statement?

A. That is right; I never made any such statement. [129]

Q. Do you recall, in the course of the discussion, Mr. Powell was asked by one of those present representing the Union, to take the contracts and point out those provisions which were acceptable to the company? A. Yes.

Q. And he listed some seven or eight?

A. I recall one of the Union representatives taking the contract and asking him to more or less make us a counter proposal.

Q. You recall that he was asked to point out the provisions that were acceptable? A. Yes.

Q. And he did point them out?

A. He didn't point any; they weren't any of them acceptable.

Q. Let us turn to this, for example, article 7 of this contract. Didn't Mr. Powell state that that clause would be acceptable if the "5" were changed to "6"? A. Yes, if we would change it.

Q. And didn't you say that "6" was all right?

A. He said that it would be acceptable if we would change it.

Q. How about Article 6? A. Yes.

Q. That was acceptable?

A. If we would change it.

(Testimony of J. W. Estabrook.)

Q. How did he want it changed? [130]

A. He didn't like the idea of having in there some of the classifications that we put in there, such as covering supervisors, foremen, foreladies, and so forth.

Q. And did he make this statement, that Montgomery Ward & Company didn't classify them as such, or didn't classify its employees as such?

A. Yes, I believe he did.

Q. And that was the basis of his objection?

A. Yes. However, he did object to it.

Q. Now, he stated as to Article 10, that there was no objection to Article 10, didn't he?

A. Well, he had some objection, but it didn't amount to very much.

Q. He substantially agreed to that?

A. No, he didn't, substantially. There was some objection on his part to the employees, that we might disagree on how long they had been there, and so on.

Q. On how that was to be interpreted, but the clause, he didn't object to that?

A. I am not sitting here trying to mislead you.

Q. I understand that. I just want the facts.

A. I am saying that, as our contract was presented, article by article, he rejected it.

Q. You don't mean to change your testimony, do you? A. No. [131]

Q. You say that he rejected every clause?

A. Yes.

(Testimony of J. W. Estabrook.)

Q. Except as that statement may be inconsistent, Mr. Estabrook, with any previous testimony?

A. As to any changes?

Trial Examiner Bokar: He has testified that the company had no particular objection to Article 10, for example.

Q. (Mr. Ball, continuing) You don't mean now to change any of the testimony you have given?

A. I am trying to state that the articles, as drafted by the Union, he objected to the articles.

Q. Have you had any recent discussions with representatives of the company?

Mr. Walker: Just a moment. I don't know what counsel has in mind. Are we on December 16th?

Trial Examiner Bokar: Evidently subsequent to that.

Q. (Mr. Ball, continuing) Subsequent to December 16. Let me withdraw the question and ask you another. Have you made any requests for a meeting subsequent to December 16?

A. I did not.

Q. Did anyone else?

A. Mr. Brown called me for a meeting.

Q. You had previously written a letter to Mr. Brown? A. Yes.

Q. And you did request a meeting? [132]

A. That telephone call did not come to me until the Board's decision in this hearing.

Q. You mean the announcement that there was to be a hearing?

(Testimony of J. W. Estabrook.)

A. The following day, after it came out in the papers that the Labor Board was going to conduct a hearing, I talked with Mr. Brown over the phone.

Q. As a matter of fact, from December 16, the time that you wrote that letter, you did not request any further meetings?

A. I didn't say we requested any further. There was nothing to talk about.

Q. You didn't request any meetings?

A. No, and neither did they.

I might state, Mr. Examiner, that we do have representatives in the eleven western states who repeatedly contact the management. Mr. Matt Tobrinmer, he is an attorney representing our Western Warehouse Council, and he spent a week or so trying to negotiate or to get the parties together. That was in Chicago. He was in conference with Mr. Barr.

Trial Examiner Bokar: When did that take place?

The Witness: That took place between the December 16 meeting and the last week or two.

Q. (Mr. Ball, continuing) So far as your union, Local 206, is concerned, you made no request?

A. Through other people, such as Mr. Tobrinmer.

Q. Mr. Tobrinmer was trying to speak for your union? [133]

A. He certainly was.

Q. And others at the same time?

A. I don't want to confuse anyone. They were authorized to speak as a sort of mediator.

(Testimony of J. W. Estabrook.)

Q. Was he authorized to represent the employees of Montgomery Ward & Company located at Portland for the purposes of collective bargaining?

A. He was not. He was only authorized to approach Mr. Barr and other officials of the company in Chicago to see if there was some way where the officials could sit down and straighten out the question.

Q. But there has been no request for collective bargaining?

A. I think that would be a request.

Q. You said that Mr. Tobrinmer was not authorized to represent you?

A. He was authorized to represent us in the first stages.

Q. You don't know what Mr. Tobrinmer did?

A. I was not there, but I helped pay his way back there.

Mr. Ball: I am through for the time being with cross examination.

I would like to ask the Board, as suggested off the record during the lunch hour that the witness now on the stand, as long as he is in the process of giving his testimony, he cautioned not to discuss the matter with anyone else.

Mr. Landye: Do I understand that Mr. Estabrook is not to talk [134] with his own lawyer? I haven't examined him yet, of course. That may be the way they do it in Illinois, but it isn't the way they do it out here. We talk to our witnesses.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Well, in some jurisdictions there is some rule that, while the witness is under examination, he is not to consult with anyone concerning his testimony.

There may be times when it is advisable to impose such a rule, but in this particular instance, I am going to deny the request. I may permit it at other times during the hearing, but not in this particular instance, as I don't think that it would be proper to deny counsel the right to confer with his witness.

Mr. Walker: I think that it would be reasonable under reasonable situations. But here is a case where we have to confer with the witness in the preparation of the case.

Mr. Landye: I want to call the Examiner's attention to the fact that we started with the unfair labor practices case which we had not anticipated doing, and therefore, I haven't conferred with Mr. Estabrook except in a casual way.

Trial Examiner Bokat: I don't see any objection to you conferring with your witness. I will permit you to do it in this instance. As I say, I may not permit it at other times during the hearing. We will have to take that up when we get to it.

At this time, I will adjourn the hearing until 9:30 tomorrow morning.

(At 4:55 p.m. April 14, 1941, hearing adjourned to 9:30 a.m. April 15, 1941, same place.) [135]

(Testimony of J. W. Estabrook.)

Redirect Examination

Q. (Mr. Landye) How many years have you been in the labor movement?

A. Almost 18 years.

Q. You have been a member of labor organizations that long? A. Yes.

Q. What labor organizations have you belonged to? A. The Teamsters.

Q. For the entire length of time?

A. Almost all the time, yes.

Q. Now, Mr. Estabrook, the proposals which are shown in Board's Exhibit No. 3, when were those proposals first drafted?

A. Last summer.

Q. By that, you mean the summer of 1940?

A. Yes.

Q. About what time last summer?

A. June or July.

Q. 1940? A. Yes.

Q. Now, referring to December 4, or thereabouts, what was the [142] Warehousemen's Union, or various reasons why the Warehousemen's Union struck Montgomery Ward?

Mr. Ball: I will object to that as not a proper matter to be brought out in this hearing, and irrelevant and immaterial, and incompetent to any issues in this case, and, for the further reason that it is going into matters which the Board has not elected to go into, and not proper for counsel to go into.

Trial Examiner Bokat: The objection is overruled.

Q. (Mr. Landye, continuing) Answer the question. A. Well, for various reasons.

Q. What were the reasons?

A. One of the most important reasons is that the membership got tired of Montgomery Ward stalling us around.

Q. What do you mean, Mr. Estabrook, when you say "stalling us around"? Tell us what you mean by that?

A. Do you want it in my own words?

Mr. Ball: Let the record show the same objection and the same ruling to the last question.

Trial Examiner Bokat: Yes, you have a standing objection.

A. Well, one reason was this: when a person is told to go to Chicago, or when a person goes to Chicago to contact Montgomery Ward Company officials, and then they tell us to go to Portland, and then from Portland we go to Oakland, and talk with some other officials there, and then we come back to [143] Portland, it is about time to think that they are stalling us along.

Mr. Ball: I move to strike that as an opinion and conclusion of the witness.

Trial Examiner Bokat: Yes, strike the last answer.

Mr. Landye: Mr. Examiner, the appearance of Mr. Estabrook here is in sort of a dual capacity.

(Testimony of J. W. Estabrook.)

One is that he is testifying to the fact; the other is as a leader in union affairs for 18 years.

Trial Examiner Bokat: I understand. The witness can state that a strike vote was taken, and when it was taken, and why it was taken, if that becomes material.

The question is, as I understand it, or one of the questions, whether the strike took place as the result of unfair labor practices. If it is a fact, then the reasons for the strike vote would have some bearing on the case.

Mr. Ball: Let the record show that the respondent does not agree with the statement just made by the Trial Examiner.

Trial Examiner Bokat: That is my understanding of the issues. Doesn't the complaint allege that the so-called unfair labor practices caused the strike?

Mr. Ball: Yes.

Trial Examiner Bokat: This testimony then would be material.

Q. (Mr. Landye, continuing) Let me ask you the question directly: was one of the reasons that the strike was called [144] because of the Union's belief that the company was not bargaining in good faith?

Mr. Ball: I will object to that, as to what the Union believed, as an opinion of the Union on what goes to the merits of this case. That is not a matter that the witness should testify to; he has shown no

(Testimony of J. W. Estabrook.)

competency, and in any event, wouldn't be competent to testify to that.

The expression of opinion of this witness, or any group of witnesses would be incompetent, and irrelevant to any issue in this case. Furthermore, it is a leading question made to his own witness.

Trial Examiner Bokat: Well, I will sustain the objection.

Q. (Mr. Landye) Will you give us fully the reasons that the Union called the strike?

Mr. Ball: I will object to that question as being a question following a leading question, and the whole purpose of the point counsel was trying to bring out was served by asking the preceding leading question.

Trial Examiner Bokat: I will have to overrule it.

A. The membership unanimously instructed me to strike Montgomery Ward.

Trial Examiner Bokat: When did this take place?

The Witness: That took place at one of our meetings, prior to the time that the strike was called.

Trial Examiner Bokat: Can you fix the time approximately? [145]

The Witness: I couldn't tell you that without referring to the records.

Trial Examiner Bokat: Were you present?

The Witness: Yes.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Was there a discussion prior to that in the meetings?

The Witness: Yes.

Trial Examiner Bokat: What was the nature of the discussion?

Mr. Ball: I will object to the question of the Examiner as calling for an opinion and conclusion of the witness, and as calling for a generalization.

Trial Examiner Bokat: I agree with you. I think that it does call for a generalization. I certainly have no objection to your objecting to my question.

Mr. Ball: I appreciate that.

Trial Examiner Bokat: What was the discussion relating to the calling of the strike?

The Witness: The only discussion was that the membership took the position,—I made the statement on the floor of the meeting that Montgomery Ward & Company was trying to give us the,—

Mr. Ball: I object to the general statement, without naming the parties who made the statement, and as irrelevant and incompetent to any issue in this case.

Trial Examiner Bokat: I will overrule the objection. [146] Was there a motion made at this meeting, with reference to a strike being called by anyone?

The Witness: No; there was not. There was not a motion actually made at the general meeting. The motion was made by people employed at Montgomery Ward & Company, at a later meeting.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: You say there was a meeting at which a motion was made to go on strike?

The Witness: That is right. That action was taken a day or two before the strike in the Al Azar Temple.

Q. (Mr. Landye, continuing) Was any other reason given besides the ones you have given?

Mr. Ball: I object to that as calling for a conclusion with reference to a question already stricken.

Mr. Landye: I am merely asking him if there were any other reasons given.

Trial Examiner Bokat: At the meeting?

Mr. Landye: At the meeting.

Trial Examiner Bokat: I will let the witness describe the general discussion at the meeting.

The Witness: Well, amongst other things, there was a discussion on the discharge of some employees for the reason that they had relatives employed at Montgomery Ward & Company.

Trial Examiner Bokat: Are we interested in that, Mr. Landye? [147]

Mr. Landye: No.

Trial Examiner Bokat: That is not an issue in this case, and therefore, I don't want to go into it.

The Witness: Just a minute. I understand it is a reason,——

Mr. Ball: I think counsel who called for the answer as one of the reasons for the strike, shouldn't object to it.

(Testimony of J. W. Estabrook.)

If he called for it, he has opened it up.

Trial Examiner Bokat: I am not preventing him from answering the question, but I am just stating that the question of discharge of certain employees because of relationship amongst the employees is not in issue in this case.

A. The Montgomery Ward Company had a rule that relatives do not work for Montgomery Ward, and there were a lot of people employed out there that were members of the union, who were relatives, and the rule had never been enforced before until certain of the people out there at Montgomery Ward's took an active part in unionizing or in organizing the place; after that, after the rule had laid dormant, they began enforcing it, and it was only enforced as to people who were members of the Union.

Mr. Ball: I will move to strike that as a conclusion.

Trial Examiner Bokat: Yes, that is a conclusion, or a generality.

Mr. Landye: Counsel was the one who said, or, rather, who insisted that the witness answer the question, and he has no right [148] to complain of the question nor the answer, once he has gotten it.

Trial Examiner Bokat: I know, but that is not in issue. Were there any other reasons?

The Witness: That is about all I can think of.

Trial Examiner Bokat: All right.

Q. (Mr. Landye, continuing) Now, Mr. Estabrook, referring to the meeting of December 13, do

(Testimony of J. W. Estabrook.)

you recall whether or not at that meeting there was any request by any of the union representatives for the company to submit a counter proposal?

A. Yes.

Mr. Ball: Just a minute. I will object to that question as being practically the testimony of Mr. Landye, putting the whole answer in the mouth of Mr. Estabrook. It is leading, of the sort that the ruling against the cross examination was intended to prevent.

I further move that my objection be inserted in the record ahead of the answer.

Trial Examiner Bokar: Yes, I will ask that the objection be put in the record prior to the answer of the witness.

Now, will you go back, Mr. Nelson, and read the question for me?

(Thereupon the last question and answer were read aloud as hereinabove recorded.)

Mr. Ball: May I, for the sake of the record, state that, in [149] addition to calling for a conclusion and opinion of the witness, it uses a term which is ambiguous. It calls for a legal conclusion as to what a counter proposal is. That is a question of law, and this witness is not qualified to give an accurate description of it.

Trial Examiner Bokar: Will you read the question again, please?

(Thereupon the last question and answer were again read aloud by the reporter as hereinabove recorded.)

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: Instead of wasting time, I presume that the question asked by Mr. Landye is preliminary. The objection is technically correct.

Mr. Landye: It is a preliminary question.

Trial Examiner Bokat: I understand, but I would rather have from the witness' mouth what took place, instead of asking him for the so-called counter proposal.

Q. (Mr. Landye, continuing). Were there any discussions at that meeting relating to a counter proposal?

Mr. Ball: Same objection.

Trial Examiner Bokat: Overruled.

Mr. Ball: For the further reason that the purpose of the question, as reframed, was to repeat the purpose of the previous improper question, taking advantage of the previous improper question.

Trial Examiner Bokat: You may answer. [150]

A. Yes, there was discussion about a counter proposal.

Mr. Ball: I move to strike that as an opinion of the witness.

Trial Examiner Bokat: The motion is denied.

Q. (Mr. Landye, continuing) What were those discussions?

Trial Examiner Bokat: State what was said, and who said it.

A. At the beginning of the meeting, Mr. Powell was asked by myself if they had a counter proposal to make, and he said "Yes."

Q. (Mr. Landye, continuing) What did he say?

(Testimony of J. W. Estabrook.)

A. "Call off the strike and put the people back to work."

Q. That is what he said? A. Yes.

Mr. Ball: It is now apparent that this calls for a repetition of matters that were gone into yesterday.

Trial Examiner Bokat: That is correct. This matter was gone into on direct.

Mr. Landye: I understand, but I am going into matters not covered, and I naturally have to have the connection.

Trial Examiner Bokat: All right, I will let it stand as a preliminary question.

Q. (Mr. Landye, continuing) Go ahead.

A. And then later in the meeting, I think that you, yourself, asked Mr. Powell for a counter proposal.

Mr. Ball: Same objection. [151]

Trial Examiner Bokat: The motion is denied.

A. (Witness continuing) He said that he had nothing to say, except that the comment that he made might be considered as a counter proposal.

Trial Examiner Bokat: I don't understand the answer. I am not sure whether I do or not. Did Mr. Powell make any further statement as to what he meant by the comments?

The Witness: No, he did not, and the only comment that he made was that, "No", against company policy.

(Testimony of J. W. Estabrook.)

Mr. Ball: I move to strike the answer out as a conclusion and opinion of the witness.

Trial Examiner Bokat: Yes, I will grant the motion. Strike it out.

Q. (Mr. Landye, continuing) Was there any written counter proposal given at that meeting?

Mr. Ball: I will object to that as irrelevant. The meetings have been gone into fully. It is obvious that it is repetition, going into matters that were thoroughly covered on direct examination yesterday, and the witness has already testified and described everything that he could recall. He so stated. This is certainly the kind of abuse against which the original objection to Mr. Landye's examination was directed; and I object, on the further ground, that it is incompetent, and irrelevant, and does not tend to prove any issue.

Trial Examiner Bokat: I will overrule the objection. [152]

The Witness: Will you repeat the question?

Mr. Ball: May I point out that this is going into the very thing, which is part of the due process problem. We are being confronted with a double barreled attack. I think that we are now verging into matters which show the great vice of this sort of practice, which is countenanced by the questions and rulings of the Examiner.

Trial Examiner Bokat: I am interested in the counter proposals offered by the company, if any were offered.

(Testimony of J. W. Estabrook.)

Mr. Ball: May I point out,—?

Trial Examiner Bokat: May I finish my statement?

Mr. Ball: Yes, certainly.

Trial Examiner Bokat: I had assumed, from a negative inference that no such counter proposals were offered. I wanted to know whether they were or not. I don't think that it has any particular bearing on the issue. Rather, I will put it this way: I don't know whether it has any bearing on the issue or not. It might have, and I would like to know.

Mr. Ball: May I point out, Mr. Examiner, that this examination of the witness by Mr. Landye is after the witness had testified yesterday afternoon, after Mr. Landye has had the opportunity to refresh his recollection as to what Mr. Landye said at this meeting?

Trial Examiner Bokat: That may have happened. I will let the question stand. Were there any written counter proposals [153] submitted at the meeting? A. No, sir; there were not.

Mr. Ball: I understand that my objection runs to this entire line.

Trial Examiner Bokat: Yes, to my questions and all the questions—

Mr. Ball: (Interposing) To the entire line?

Trial Examiner Bokat: Yes.

Q. (Mr. Landye, continuing) Were there any discussions at the December 13 meeting relating to

(Testimony of J. W. Estabrook.)

whether or not anyone had the power to act for the company?

Mr. Ball: Same objection, going into the December 13 meeting; fully covered.

Trial Examiner Bokat: That is technically correct. I will allow it.

A. Yes, there was some discussion as to who had the power to negotiate.

Q. (Mr. Landye, continuing) And were those discussions between you and Mr. Powell, or who were they between, and what were they about?

Mr. Ball: Same objection.

Trial Examiner Bokat: Overruled.

A. They were between you and Mr. Powell.

Q. (Mr. Landye, continuing) What, exactly, was said?

Mr. Ball: Let the record show that my objection runs to the [154] entire line of examination?

Trial Examiner Bokat: Yes.

A. You asked Mr. Powell if he had the power to negotiate an agreement, and he said, "I don't know; I guess so," that the Board of Directors would have to sign it.

Mr. Landye: I think that is all.

Redirect Examination

Q. (Mr. Walker) Mr. Estabrook, I call your attention to your testimony on direct examination relative to the comment of Mr. Powell that the force and effect of Article 13 of the agreement, marked

(Testimony of J. W. Estabrook.)

as Board's Exhibit No. 3 would be satisfactory, provided the results of the Board of Arbitration would not run counter to company policy.

Mr. Ball: Well, I want to object to this. I don't know whether it is redirect, or what it is. It is certainly leading in form, and not proper redirect examination, going into matters that have previously been covered.

Trial Examiner Bokat: I don't believe that a question has been asked, Mr. Ball.

Mr. Walker: There is no question before the witness.

Mr. Ball: There isn't?

Trial Examiner Bokat: It is just a statement calling attention to his testimony.

Mr. Ball: All right. I just lost myself in this long chain of words. [155]

Q. (Mr. Walker, continuing) Mr. Estabrook, what effect would the acceptance of Mr. Powell's suggestion relative to the arbitration, if the results of the arbitration were not contrary to company policy, have on the operation of the agreement as a whole?

Mr. Ball: Same objection.

Trial Examiner Bokat: Yes, I will sustain that. It calls for a legal conclusion.

Mr. Walker: That is all.

Trial Examiner Bokat: Any recross?

(Testimony of J. W. Estabrook.)

Recross Examination

Q. (Mr. Ball) Before you went into this meeting where Mr. Landye was present, you had a discussion with Mr. Landye? A. Which meeting?

Q. Of December 13 and 14, about the tactics to be employed at that meeting?

A. No, I don't think so; I don't recall any.

Q. You had a discussion with Mr. Landye as to what you could do in the way of asking questions to build up an unfair labor practices charge against this company?

A. No. I have negotiated a contract or two since I have been in this business, and I don't have to ask anybody.

Mr. Ball: I move to strike the answer out, Mr. Examiner. I asked the witness if he had any discussion with Mr. Landye about the possibility of building up an unfair labor practices charge against the company. [156]

Trial Examiner Bokat: I will strike the answer. Answer the last question, will you?

A. No.

Mr. Walker: I submit that counsel asked for the question, and then he didn't like the answer.

Trial Examiner Bokat: The answer is "no"?

The Witness: That is correct, yes. The answer is "no".

Q. (Mr. Ball, continuing) You had no discussion with Mr. Landye before this meeting about unfair labor practices charges? A. No.

(Testimony of J. W. Estabrook.)

Q. When did you file the charge with the Labor Board? A. I don't have the date.

Mr. Landye: The record shows the date.

Mr. Ball: Sometimes these records do not show the date of the original charge after they have been revamped.

Mr. Walker: If they were revamped or amended, both charges would be *show*, or, rather, it would show whether it was the original charge or the amended charge.

Trial Examiner Bokat: I call the attention of counsel to the fact that the original charge was filed on January 20; no, it was filed on January 21, 1941. Is that correct, Mr. Walker?

Mr. Walker: Yes.

Q. (Mr. Ball, continuing) Had you had any previous discussions with the National Labor Relations Board relative to the filing [157] of charges for failure to bargain? A. No, sir.

Q. What time was it that you caused to be circulated amongst your employees information to the effect that these charges were going to be filed in order for them to get back pay?

A. I never——

Mr. Walker: Just a minute. I will object to that as assuming facts not in evidence.

Trial Examiner Bokat: Yes, reframe your question.

Q. (Mr. Ball) All right. Have you at any time led any of your members to believe that they were

(Testimony of J. W. Estabrook.)

going to get back pay as the result of your filing charges with the National Labor Relations Board?

A. No, sir.

Q. You have never caused any information to be circulated amongst the members to the effect that they would get back pay if charges were filed with the Board? A. No, sir.

Q. Have you heard it discussed?

A. Yes, I have heard lots of discussion, but this is a free country.

Q. Have you ever seen or caused stories to be placed in the newspapers to that effect?

A. No, sir.

Trial Examiner Bokat: It has been called to my attention [158] that the petition for certification and investigation of the office employees was filed January 21, and not the charge filed against the company. I was looking at the wrong file. The charges filed by the Warehousemen's Union were on December 10, 1940. The original charge is in evidence, and that can be verified.

Mr. Walker: Excuse me. It is December 13, and the Retail Clerks was on the 21st of December.

Q. (Mr. Ball, continuing) Then you had already drafted and prepared for filing with the National Labor Relations Board the charges for failure to bargain collectively before you went into this session on December 13?

Mr. Landye: That is argumentative. The record speaks for itself as to the time. He is merely arguing with the witness.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: You are technically correct, but I will let the question stand.

The Witness: Will you repeat the question?

Trial Examiner Bokat: Will you read the question, Mr. Reporter?

The Witness: Let me have the question again.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Not necessarily; it could have been after the meeting.

Q. Those charges had been discussed between you and Mr. Landye prior to the time that they were filed with the National [159] Labor Relations Board? A. I don't remember.

Q. Well, now, let me refresh your recollection. Looking at the copy of your original complaint filed on December 13,—

Trial Examiner Bokat: The original charge.

Q. (Mr. Ball, continuing) The original charge. You will notice that your name and Mr. Landye's name appear on the complaint.

A. That is right.

Q. You had discussed it with Mr. Landye, had you not? You had discussed the substance of that complaint before that complaint was filed?

A. I don't think that we discussed it until after the meeting.

Q. Who prepared the statement in the charge?

A. I did.

Q. Without consultation with Mr. Landye?

(Testimony of J. W. Estabrook.)

A. Well, I furnished the information.

Q. Mr. Landye drew it up, did he not?

A. He drew up what I told him to.

Q. Did he use your actual language in the charge, or did he use some language of his own?

A. I think that he had something to do with it.

Q. You had furnished the information, and, in other words, had discussed the matters with him relating to this before the charge was drawn?

A. Yes. [160]

Q. So you had had a discussion with Mr. Landye prior to the time of the meeting of December 13?

A. I think we did it after the meeting.

Q. At least, you had it before the meeting of December 16? A. Yes.

Q. You had never discussed possible charges with the National Labor Relations Board before the meeting of December 13, although this long charge was prepared by you and filed with the Board on the same day that the meeting was held?

A. It could be; I think that is right. I think that you answered it.

Q. What is your recollection?

A. That is my recollection.

Q. You are testifying under oath that you did not discuss those matters with Mr. Landye before you went into the meeting of December 13?

A. I don't think that we did; I don't remember.

Q. Are you testifying under oath that you did not file these charges, and did not go into the

(Testimony of J. W. Estabrook.)

meeting with the intention of building up the charges?

A. I have answer that twice; No, I did not.

Q. You had discussed these charges before you went into the meeting of December 16?

A. December 16?

Q. Yes. [161]

A. Yes. Sure, there had been discussion by that time.

Q. Well, now, let me call your attention to this document. (indicating document) The charge there shows that it was subscribed and sworn to on the 10th day of December, doesn't it?

A. That is right.

Q. Now, is the oath taken by Mr. Landye there correct, or is your statement on the stand correct, under oath?

A. Just a minute. Where is that other copy? I guess I was three days wrong there. You had the record, I didn't.

Q. Then your recollection of it is what? Is it right or wrong? Your testimony here was that you did not discuss this matter with Mr. Landye, and therefore, your testimony was false?

Mr. Landye: Just a minute. He didn't state that he had not discussed it with me; he said he had.

Trial Examiner Bokst: The objection is well taken to the form of the question. Reframe it.

Q. (Mr. Ball, continuing) Now, with **this in** your hand, do you recall having had a discussion

(Testimony of J. W. Estabrook.)

with Mr. Landye about the filing of an unfair labor practice charge against Montgomery Ward & Company prior to the time of the meeting of December 13?

A. I still say that I don't recall the date; but I apparently did.

Mr. Ball: That is all. [162]

Trial Examiner Bokat: Are there any further questions of this witness? The witness is excused.

(Witness excused)

Mr. Ball: I want to make one statement for the record. Will the Trial Examiner confirm this statement, that the records which were shown to Mr. Estabrook were the records of the original files in the Board's possession, now admitted in evidence as Board's Exhibit No. 1, and not records kept by me.

Trial Examiner Bokat: I think it is apparent from the record that you showed to the witness the original charge contained in the files, and the matter referred to the witness was in the files of the Board.

Mr. Ball: Thank you.

Mr. Walker: Mr. Holmes.

MARK HOLMES

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokar: Give your full name and address to the reporter.

The Witness: Mark Holmes, (spelling).

Trial Examiner Bokar: M-a-r-k H-o-l-m-e-s?

The Witness: Yes.

Direct Examination

Q. (Mr. Walker) Where do you live? [163]

A. 7706 Southeast Reedway.

Q. In Portland? A. Yes.

Q. What is your present occupation?

A. Business agent for the Warehousemen's Union.

Q. How long have you held that position?

A. About 3-1/2 years.

Q. That is for Local 206? A. Yes, sir.

Q. And in that position have you had occasion to meet with any representatives of the respondent here?

A. I have been in every meeting with the Warehousemen,—every meeting that the Warehousemen have had with Montgomery Ward and Company.

Q. You mean the meetings held in Portland?

A. Yes, and in Oakland, also.

Q. When was the first meeting that you attended?

(Testimony of Mark Holmes.)

A. Well, I think the record as to the dates is here, and I attended every one in Portland except the last one when Mr. Brown was present.

Trial Examiner Bokat: I think that it has been testified that the first meeting took place in November,——

Mr. Ball: November 12.

Trial Examiner Bokat: November 12, 1940.

Q. (Mr. Walker, continuing) Who attended that meeting representing Local 206? [164]

A. Mr. Estabrook and myself.

Q. Who attended the meeting representing the Respondent?

A. Mr. Powell and Mr. Barth and Mr. Huddleston.

Trial Examiner Bokat: Is the testimony of this witness going to be substantially the same as that of the previous witness?

Mr. Walker: I am not going to go over with this witness the details with such minuteness. In some respects it will be the same; in others, it will not.

Trial Examiner Bokat: My understanding is that he is going to testify about the same conferences as the previous witness testified about?

Mr. Walker: That is correct.

Trial Examiner Bokat: All right, proceed.

Q. (Mr. Walker, continuing) Was a form of Board's Exhibit 3 at the meeting on November 12 before the parties?

(Testimony of Mark Holmes.)

A. Yes, the form of our proposed contract?

Q. Yes. A. Yes, it was.

Q. Do you know a Mr. Estabrook?

A. Yes.

Q. You say that you and Mr. Estabrook met with the Respondent's representatives in various meetings. Did you meet with any of the respondent's representatives at a time prior to November 12?

A. No, I didn't. [165]

Q. On or about September, 1940 do you know where Mr. Estabrook was?

A. I believe he was in Denver, or back east.

Q. How do you know that he was in Denver?

A. The Western Conference of Teamsters was held in Denver, and Mr. Estabrook sent us a letter asking that we forward at least three or four copies of the Montgomery Ward proposed agreement to Washington, because he was going to meet with the Company officials in Chicago.

Q. Was it done? A. It was.

Q. After Mr. Estabrook's return from the East, did you have occasion to telephone or make contact with any of the representatives of the respondent, and before the meeting of November 12?

A. I did not, no.

Q. I see. Did you have any talks with Mr. Huddleston at any time prior to November 12?

A. Not to my knowledge.

Q. Now, will you relate what occurred at the meeting of November 12? Let me withdraw that

(Testimony of Mark Holmes.)

question. Was there a discussion relative to a meeting between Mr. Estabrook, and Mr. Heidinger, Mr. Ball and Mr. Barr?

Mr. Ball: I will object to this as not being a competent way to prove this. Besides, it is repetitious. [166]

Trial Examiner Bokat: I will sustain the objection.

Mr. Walker: I submit that he can answer that "yes" or "no".

Trial Examiner Bokat: I know, but we have gone over that. Suppose that you reframe it.

Q. (Mr. Walker, continuing) At the meeting of November 12, do you recall how the meeting opened up, or how the discussion got under way?

A. Well, Mr. Estabrook started the meeting by saying that he had met with the officials of the Company in the East, and that they were willing to sit down and discuss an agreement and come to a contract.

Q. And then following that, what was done?

A. We submitted our proposals of the agreement,—copies of the agreement.

Q. And a copy of the agreement was before each party present at that meeting? A. Yes.

Q. Was the agreement then taken up or discussed? A. Yes, we discussed it.

Q. In what manner was it discussed?

A. Well, each party had a copy of it, and we were to go through the agreement, clause by clause,

(Testimony of Mark Holmes.)

and the clauses on which we disagreed we were to pass on, or pass by, and then come back to them later.

Q. Did anybody make any suggestion similar to that? [167] A. Yes.

Q. Who?

A. Mr. Estabrook made the statement.

Q. Will you refer to Board's Exhibit No. 3, and state whether or not there was any discussion concerning that article?

Mr. Ball: I don't wish to be technical, because we have certainly nothing to conceal. However, it seems to me that the time of this hearing is being consumed by a detailing of matter already gone into.

Trial Examiner Bokar: I agree with you that it should not be repeated. However, I can't determine at this time whether there is any variance between the Board's Witnesses and the Respondent's Witnesses as to what took place. I will let him go ahead for the time being to see how it goes.

Q. (Mr. Walker, continuing) You may answer.

A. They objected to it as an article. They said that it was a matter of fact, because we had been designated as the sole collective bargaining agent by the Labor Board. However, they didn't agree to have it in the contract. They said the law would take care of that.

Q. What did you do after that?

A. We went to Article 2.

(Testimony of Mark Holmes.)

Q. Was there any discussion on Article 2?

A. Absolutely, there was.

Q. What was the discussion? [168]

A. Against company policy, and they wouldn't agree to any part of it.

Q. Who said that? A. Mr. Powell.

Q. What did you do on Article 2?

A. We put a check in front of it, and went to the next article.

Q. What occurred with respect to Article 3?

A. Well, for the first sentence, they said that would be all right, but they said they worked some employees at certain times of the year for more than 8 hours without the payment of overtime. They were willing that overtime be paid over 40 hours a week, but not over 8 hours in any one day, and Saturday could not be an overtime day. The way the work week was staggered, it started out on Friday and ran until Thursday the next week. It was also necessary, they stated, that they start some of the employees at 5:30 in the morning.

Q. What was done with respect to Article 3?

A. Well, we put a check in front of it and went on to the next article.

Q. Was there any discussion concerning it?

A. Article 4?

Q. Yes.

A. Yes, Mr. Powell said at that time that they could not get any increases at all. There was also

(Testimony of Mark Holmes.)

a disagreement as to some of [169] the classifications, as to whether they came under our jurisdiction. I think it was the tailor and the *had* tailor, —I don't know which; there was one or two others.

Q. I call your attention to Article 6. Was there any discussion concerning it?

A. Well, the only thing they said was that they didn't employ anybody under those names, and they didn't think it was necessary or any use to argue about something that they didn't contemplate doing.

Q. When you say "they", whom do you mean?

A. I mean the company.

Q. Next, I call your attention to Article 11. Was there any discussion concerning it?

A. Yes.

Q. Tell us about it?

A. There was quite a bit of discussion. After reading it through the company could not see the reason for it. And I tried to explain to them why, and I brought up a case at the time. The linoleum layers were having a disagreement with Montgomery Ward & Company; they were trying to put Montgomery Ward on the unfair list, because they would not sign up with them. I told Mr. Ball that it would be for his protection; that before any employees of Montgomery Ward could call a strike, they would have to go before the Portland Central Labor Council to defend themselves against any charges. [170]

(Testimony of Mark Holmes.)

Mr. Powell said, after changing the wording a little, he would probably agree to it.

Trial Examiner Bokat: Agree to the entire section 11?

The Witness: Yes.

Q. (Mr. Walker, continuing) Let us go back to Article 10. Was there any discussion on it?

A. That is, on the vacation?

Q. Yes.

A. They felt that it was up to the company, and that it should be left to them as to who was the judge when they had been there a year or not.

Q. I call your attention to Article 13. Was there any discussion concerning it?

A. Yes, quite a bit.

It came up several times during the meeting, and the company felt that the final say should be with the company as to the matters we discussed, as to discharge, and so forth; that they should have the final say.

Q. Was there anything else discussed at that meeting? A. No, not that I know of.

Q. When was the next meeting that you attended?

A. I attended a meeting in Oakland, California.

Q. Who were representing the Union?

A. Mr. Estabrook and myself; Mr. White, and three or four representatives of the Retail Clerks.

[171]

Q. Do you know a Mr. Towers? A. Yes.

(Testimony of Mark Holmes.)

Q. Was he there? A. Yes.

Q. Who represented the respondent?

A. I know Mr. Powell was there, and I believe that Mr. Denecke. And there were six or seven officials of the company; I don't remember their names.

Q. How did that meeting begin?

A. Well, it began by a discussion of the agreement, and it soon ended; we were trying to find out what the company policy was. When Mr. Estabrook came back from Chicago, he was told that Mr. Powell and Mr. Huddleston had the power to settle the strike; and we found that most of the things that we proposed were against company policy. And we tried to find out what the company policy was, whether it was a set of books or company philosophy, or what it was.

Mr. Ball: I move to strike the answer of the witness as indulging in opinions and conjecture, based on hearsay. That is not a statement of fact. I object particularly with relation to what Mr. Estabrook found.

Trial Examiner Bokat: That part may be stricken out. The other part may stand. Of course, it is difficult for the Examiner to strike out any portions of an answer that is somewhat extended, unless his attention is called to the particular [172] portion.

Q. (Mr. Walker, continuing) Was there any discussion concerning a publication on company policy, or any books or pamphlets relating to that?

(Testimony of Mark Holmes.)

A. I believe that Mr. Powell said there wasn't any such,——

Trial Examiner Bokat: Well, any such what?

The Witness: Not any written policy of the company.

Q. (Mr. Walker, continuing) Now, did you have copies of the agreements before the parties?

A. I believe we did, yes.

Q. And was there any discussion on the agreements?

A. There wasn't so very much, it was mostly on the policy, because every time we discussed an article, it was always against the company policy.

Mr. Ball: I move to strike the last part of the answer, that "every time we discussed an article, it was always against the company policy."

Trial Examiner Bokat: Yes. Strike it out.

Q. (Mr. Walker, continuing) Why wasn't the agreement discussed at that meeting?

A. Well, it didn't seem like,——

Mr. Ball: I will object to that as not calling for the proper testimony.

Trial Examiner Bokat: Yes. Sustained as to the form. Reframe it.

Q. (Mr. Walker, continuing) Was there any reason for discussing [173] the question of company policy at that meeting? A. Yes.

Q. Go ahead and tell us.

A. At that meeting, I asked Mr. Powell if the company policy had changed any in the last few

(Testimony of Mark Holmes.)

years, and he said not; not to his knowledge, that it had not; and then I asked him if the policy of the company was the same now as in 1936 or 1937, when they discharged 100 or 150 people for joining the union, and he said, "not to his knowledge," that the company policy had not changed since that time, or since that date.

Q. Was there any other conversation, or anything else said about company policy? A. No.

Q. That you recall?

A. Not that I recall.

Q. Was there any reason given, or were there any reasons why the discussion of the proposed agreement was not taken up at that time?

A. Well, we tried to find out who would have the power to settle the dispute if we did arrive at an agreement; that is, if we did arrive at the agreement, who would have the power to sign it. We didn't seem to be able to find out.

Trial Examiner Bokar: How is that?

The Witness: We didn't seem to be able to find out who had the power. [174]

Mr. Ball: I move to strike that as a conclusion of the witness, the result of a conversation, rather than what was said.

Trial Examiner Bokar: All right, I will sustain the objection. State more particularly what was said, and by whom.

Q. (Mr. Walker, continuing) Did any of the representatives of the Union make any inquiry to

(Testimony of Mark Holmes.)

determine who had the power to execute an agreement if such was reached? A. Yes.

Q. Who?

A. Mr. White asked Mr. Powell that question.

Q. And did Mr. Powell answer?

A. He said that the Board of Directors would sign any agreements that we arrived at.

Q. Was there any inquiry concerning the location of the Board of Directors, or the head officers of the company?

A. Yes. After quite a bit of discussion on company policy, Mr. Estabrook asked that, and he also asked that if he and Mr. Powell and Mr. White would take the plane to Chicago to settle the thing, could they settle it right there; he said that that was the only thing to be done, apparently. If whatever we proposed was against company policy, he wanted to know whether they could go back there and decide it.

Trial Examiner Bokat: Who said that?

The Witness: Mr. Estabrook. [175]

Trial Examiner Bokat: To whom?

The Witness: Mr. Powell.

Trial Examiner Bokat: What was his reply?

The Witness: He said he would contact them and find out after they got out of the meeting, and then let us know Thursday of the next week.

Q. (Mr. Walker, continuing) Did you meet with Mr. Powell again?

(Testimony of Mark Holmes.)

A. I believe that Mr. Estabrook did; I did not. I don't know whether he did or not.

Q. Did you go back to Chicago? A. No.

Q. Do you know what Mr. Estabrook learned from Mr. Powell, if anything?

A. I don't know that.

Q. Is there anything further that occurred in that meeting in Oakland?

A. Not that I recall, no.

Q. Did you meet with the company again after that?

A. Yes, we met back here in the City of Portland.

Q. Who represented Local 206 at that meeting?

A. Mr. Estabrook and myself.

Q. Who represented the company at that meeting?

A. Mr. Barth, Mr. Powell, and Mr. Huddleston. I think Mr. Denecke was sitting in some of the meetings. I am not sure [176] about that.

Trial Examiner Bokat: Are you referring to the meetings of December 13 and 14 and 16?

The Witness: Yes, we are back in Portland now.

Trial Examiner Bokat: Those are the meetings at which Mr. Ashe was present?

The Witness: That is right.

Q. (Mr. Walker, continuing) Were copies of the proposed agreement before the parties at that time? A. They were.

(Testimony of Mark Holmes.)

Q. Was the proposed agreement discussed at that meeting? A. Yes, at some length.

Q. How did that meeting open up?

A. It was the same as the other ones; we started on the different clauses of the agreement, and didn't get any place with them.

Trial Examiner Bokat: You are referring to the same agreement, Board's Exhibit 3?

The Witness: Yes, the same agreement.

Trial Examiner Bokat: All right.

Q. (Mr. Walker) Were any other persons present than the ones that you have just now mentioned? Were any other persons other than Mr. Estabrook, yourself, Mr. Ashe, Mr. Denecke, Mr. Huddleston and Mr. Barth?

A. I believe Mr. Landye was present.

Q. Do you know a Mr. Dixon? [177]

A. Yes.

Q. Was he present? A. Yes.

Q. Do you know a Mr. Hicks? A. Yes.

Q. Was he there?

A. Yes, and Mr. Langford was there.

Q. Do you know Mr. Allen? A. Yes.

Q. Was he there? A. Yes.

Q. Anybody else?

Mr. Ball: We agreed that the parties were there that Mr. Estabrook testified were there.

Mr. Walker: All right.

Q. (Mr. Walker, continuing) Now, didn't the meeting at Oakland and this meeting of December 13,—strike that. Between the time of the meeting

(Testimony of Mark Holmes.)

at Oakland and this meeting of December 13, had you received any written instrument from the company? A. I had not.

Mr. Ball: I will object to that as calling for a matter that has nothing to do with the case, and irrelevant to any issue involved.

Trial Examiner Bokat: You mean this witness?

Mr. Walker: Local 206. [178]

A. I had not received any.

Q. (Mr. Walker, continuing) Do you know if Local 206 had?

Trial Examiner Bokat: Local 206?

Mr. Walker: Yes.

Mr. Ball: What about my ruling, Mr. Examiner?

Trial Examiner Bokat: I will let the question stand.

A. It would be in Mr. Estabrook's capacity as financial secretary.

Q. You mean in his possession?

A. That is right.

Q. Had you learned whether any was received?

Mr. Ball: I will object to that, naturally. I have been rather patient; I think the Examiner will appreciate that. However, we should keep this hearing within some bounds.

Trial Examiner Bokat: Is there any dispute as to whether the company submitted a counter proposal, if you want to call it that, or if you don't want to call it that, a written form of agreement? Is there any dispute whether that happened or not?

(Testimony of Mark Holmes.)

Mr. Ball: I don't think there is any dispute. So far as I know, no written document purporting to be a contract with the Union, or a proposed contract, was ever prepared by the Company and given to the Union.

Trial Examiner Bokat: Is that agreeable?

Mr. Walker: Yes, that is agreeable. [179]

Trial Examiner Bokat: It is not decisive of anything, of course.

Mr. Ball: Let the record show that we object to any inquiry into such matters, although I made the statement as a statement of fact to clear the record.

Trial Examiner Bokat: Yes, your statement is on the record, and you object to the relevancy of any such questions. Let us proceed.

Q. (Mr. Walker) What occurred on the meeting of December 13?

A. Mr. Ashe, of the Federal Labor Conciliation Service was present at that time, and we discussed the point of how we could get together. The first question was whether we were going to get any counter proposals, and it was discussed again at that meeting.

Mr. Ball: I will object to this generalization of the witness, which can have no probative weight.

Trial Examiner Bokat: I am afraid that you are correct, Mr. Ball. I will have to sustain the objection.

Q. (Mr. Walker, continuing) Mr. Holmes, did Mr. Ashe take part in that meeting?

(Testimony of Mark Holmes.)

A. He did.

Q. What did he say?

A. He asked if there was some way that the company and the Union could get together on an agreement, and if the company would make a counter proposal. [180]

Q. Was that question answered? A. Yes.

Q. Who answered it? A. Mr. Powell.

Q. What did he say?

A. No; that the company had nothing to ask of the union; that the union was coming to the company for something, and not the company coming to the union.

Q. Did Mr. Landye take any part in the meeting?

Trial Examiner Bokat: Are you referring to December 13?

Mr. Walker: December 13.

A. Well, he wasn't there on the second meeting when Mr. Ashe was present.

Trial Examiner Bokat: I think the question was directed to the first meeting, December 13. There were three meetings, as I understand it, December 13, 14 and 16.

A. Yes, Mr. Landye was present.

Trial Examiner Bokat: On December 13?

The Witness: Yes.

Q. (Mr. Walker, continuing) Did he take part in the meeting?

(Testimony of Mark Holmes.)

A. Yes. He also asked for a counter proposal in writing of some kind.

Q. What was it that Mr. Landye said?

A. He asked if the company wouldn't give us a counter proposal.

Q. Was that answered? [181]

A. Yes.

Q. How was it answered, and by whom?

A. That was answered with a flat "No".

Q. By whom? A. Mr. Powell.

Mr. Ball: I move to strike the word——

Trial Examiner Bokat: Yes, strike the word "flat" out.

Mr. Ball: I will ask that the witness be instructed to state what was said, without conclusions.

Trial Examiner Bokat: Yes, state as near as you can what took place.

Q. (Mr. Walker, continuing) What discussion concerning the proposed agreement was had?

A. Just a general rehash of what we had gone through before.

Q. Was the agreement discussed by articles?

A. I believe some of them was, yes.

Q. Were comments relative to the articles made by any representative of the company?

A. None other than had been gone through before.

Mr. Ball: I move to strike that as a conclusion.

Trial Examiner Bokat: Yes.

(Testimony of Mark Holmes.)

Mr. Ball: Furthermore, let me call to the Examiner's attention that we are getting to matter that that is very repetitious.

Mr. Walker: If we are going to be limited to what was actually said and done, I would rather do it that way than skip [182] over it by a conclusion.

Trial Examiner Bokat: I understand your reason.

Mr. Walker: We will go through it clause by clause.

Trial Examiner Bokat: May be we can save time. Is it the Board's contention that what happened at the December 13 meeting with relation to the discussion of the articles, is the same as happened on the November 12 meeting? And that the respondents took the same position? I want to know if it is your contention that the respondent took the same position, or a different position.

Mr. Walker: I think it was the same day in and day out.

Trial Examiner Bokat: That is your contention?

Mr. Walker: Yes.

Trial Examiner Bokat: Let's see if the witness will testify as to the position that the company took at that time as compared with November 12.

Q. (Mr. Walker, continuing) Will you refer to your copy of the agreement. At the meeting of December 13, was there a discussion on Article 1?

A. I believe there was, yes.

(Testimony of Mark Holmes.)

Q. And what was said relative to that article, Article 1?

A. It was against company policy, and the company could not agree to it.

Trial Examiner Bokat: Article 1?

The Witness: No. The company agreed to it.

[183]

Trial Examiner Bokat: Listen to the question, and then answer it.

A. (Witness continuing) The company said it was a matter of record that we were recognized as the sole collective bargaining agency, but they saw no reason why it should be a part of the agreement.

Q. (Mr. Walker, continuing) Now, were each of the succeeding clauses of the agreement discussed at that meeting?

A. I think that we got through most of them.

Q. Did you meet again after that?

A. Yes, we met again the latter part of the week; later on in the week.

Q. The next day?

A. No; I think it was the latter part of the week, or a few days later.

Trial Examiner Bokat: It has been agreed that the next meeting took place December 13.

Q. (Mr. Walker, continuing) Were substantially the same individuals present at the second meeting as were present at the meeting of the 13th?

A. They were.

(Testimony of Mark Holmes.)

Q. Was there a form of agreement discussed at that meeting? A. There was.

Q. Were copies of the agreement before all the parties? A. I believe so, yes. [184]

Q. How did that meeting open up?

A. Well, I believe Brother Estabrook opened up the meeting by asking if the company desired to make any counter proposals, or discuss the proposed wage scale again.

Q. Was any reply given to that?

Mr. Ball: I move to strike the question out as to Mr. Estabrook's opening up the meeting and asking for counter proposals. I move to strike that on the ground that it is calling for a conclusion of the witness; that it is a matter that Mr. Estabrook has already testified to.

Trial Examiner Bokat: Will you read the last question and answer?

(Thereupon the question and answer referred to were read aloud by the reporter as follows:

“Q. How did that meeting open up?

“A. Well, I believe Brother Estabrook opened up the meeting by asking if the company desired to make any counter proposals or discuss the proposed wage scale again.”)

Mr. Ball: I object, further, on the ground that it is ambiguous.

Trial Examiner Bokat: I will let it stand.

(Testimony of Mark Holmes.)

Mr. Walker: Frankly, I don't see any ambiguity to it. I think that it's quite clear.

Trial Examiner Bokat: Proceed.

Mr. Walker: Now, Mr. Reporter, will you read the pending [185] question?

(Thereupon the pending question was read aloud by the reporter as follows:

“Q. Was any reply given to that?”)

Mr. Ball: I will object to that, for the same reason, Mr. Examiner, that I moved to strike the previous answer.

Trial Examiner Bokat: Same ruling. I will overrule it.

A. The reply was that the company had nothing to counter propose, that the union was coming to the company for something, and the company didn't have to propose anything.

Trial Examiner Bokat: Who said that?

The Witness: Mr. Powell.

Trial Examiner Bokat: Did he also state that on December 14; did you so testify?

The Witness: Yes.

Trial Examiner Bokat: The same as the day before?

The Witness: Yes.

Q. (Mr. Walker, continuing) Do you know Mr. Eugene Allen? A. Yes.

Q. Was he at the meeting? A. Yes.

Q. Did he take part in the discussion?

(Testimony of Mark Holmes.)

A. I don't believe that he did.

Trial Examiner Bokat: The record doesn't mean anything. It doesn't show who Mr. Allen is.

[186]

Mr. Landye: He is an executive officer of the Office Workers, I believe.

Mr. Ball: Mr. Allen was identified by Mr. Estabrook in the record, I believe.

Trial Examiner Bokat: All right, let us proceed.

Q. (Mr. Walker, continuing) Now, what discussion of the agreement took place at that meeting?

A. Practically the same discussion as had taken place at the other meeting.

Q. What was said concerning Clause No. 1 or Article No. 1?

A. I don't believe that we discussed that very much.

Q. Was Article 2 discussed at that meeting?

A. I believe it was.

Q. What was the discussion on Article 2?

A. He asked that the company, or if the company wanted to discuss Article 2, or to give us some kind of a counter proposal, and he said "no", that was absolutely out so far as company policy was concerned.

Q. What did you do after that?

A. I believe that was the meeting at which Mr. Ashe was present. He kind of took over the meeting and asked questions.

Q. You mean Mr. Ashe?

A. Yes.

(Testimony of Mark Holmes.)

Q. What did Mr. Ashe ask?

A. He just asked a few questions, trying to get some basis for [187] the settlement of the thing.

Q. Do you recall what he asked along the lines of determining what basis of settlement could be arrived at? A. No, I don't.

Trial Examiner Bokat: Off the record.

(There was a discussion off the record)

Trial Examiner Bokat: We will suspend for ten minutes at this time.

(Thereupon, at this time a short recess was taken, after which proceedings were resumed as follows:)

Trial Examiner Bokat: The hearing will be in session. You may proceed when you are ready, Mr. Walker.

Q. (Mr. Walker, continuing) Will you indicate what discussion was had relative to Article 1 of the agreement at the time of the December 14 meeting?

A. I believe the company's position was the same as it was before.

Q. And what was that?

A. That they agreed, by winning the election, we were sole collective bargaining agent.

Q. But the comment relative to the wording as set out in Board's Exhibit 3 was the same as the comment made at the meeting of November 25; is that correct? A. Yes.

(Testimony of Mark Holmes.)

Q. Well, no. The meeting of November 12? [188]

A. Yes, it was.

Q. What was said relative to Article 2 at that meeting? Referring to December 14?

A. Same objection; against company policy.

Q. Now, was there any further discussion concerning the use of the phrase "company policy" at that meeting of December 14?

A. I believe we tried to find out just what the company policy was.

Mr. Ball: Oh, that should be stricken out. His statement that he believes this, that and the other thing, certainly is not proper. I have not objected, because it would slow up the proceedings. However, I would hate to have the record show that we concede that any of this is evidence on the issues, by not objecting.

Trial Examiner Bokat: Reframe your question.

Q. What was said concerning company policy at this meeting of December 14?

A. Well, the question was, we were trying to find out what the company policy was, and we were unable to do so.

Q. Did you ask any of the representatives of the company what the policy of the company was with reference to the full force and effect of a closed shop, or a union shop, or preferential hiring?

A. Mr. Powell,—

Mr. Ball: Just a minute. I move to strike the last question [189] and answer. I have reference

(Testimony of Mark Holmes.)

particularly to the answer of the witness when he said "we were unable to do so".

Trial Examiner Bokat: That is right.

Mr. Ball: Let it be understood that our objection runs against all such testimony.

Trial Examiner Bokat: You don't mean to imply by my agreeing to strike that, that I am striking all things out to which no objection was raised?

Mr. Ball: I am trying to not slow up the proceedings, but I don't want it considered, by not objecting, that we consider such evidence is of any probative value. There is a lot of testimony that has no probative weight, and I want it understood that we are objecting to any statement or statements of the state of mind of the union, or as to what the company's position was.

Trial Examiner Bokat: Let the record so show. What I want is to get at what was said and done. I will use my own intelligence in digesting the testimony.

Mr. Ball: Naturally, but we don't want the record to show that we waive any of our rights because we have not objected to any of the hundreds of times that something of that kind has been stated.

Trial Examiner Bokat: The record will show your objection. Proceed.

Q. (Mr. Walker, continuing) Did any of the parties representing [190] Local 206 ask any of the

(Testimony of Mark Holmes.)

representatives of the company what the policy of the company was relative to a closed shop, or a union shop, or a preferential shop? A. Yes.

Q. And what was asked along that line?

A. The question was asked what the company's position was on this closed shop, or union shop, and the company, through Mr. Powell, replied that if a man wanted to belong to a union, he could; and that if he didn't desire to do so, he didn't have to, and that they didn't want to do anything that would be understood as forcing the free choice of their employees.

They didn't want to be understood to be influencing the free choice in any way.

Q. Was there a discussion concerning the open shop?

A. I believe the company was asked if they would sign an open shop agreement, if they could make some adjustments of pay, or wages.

Q. Who said that?

A. Mr. Powell—Mr. Estabrook, I believe. Mr. Powell answered.

Q. What did Mr. Powell reply?

A. He said that at the time they couldn't give any wage increases.

Q. Did he say anything further after stating that the company could not make any wage increases? A. No, he did not. [191]

Q. Did he give any reasons for his answer?

A. He said that he felt that the company here

(Testimony of Mark Holmes.)

were paying as much as they were in competitive lines of business.

Q. What took place after Mr. Powell said that the company was paying as much as they were in competitive lines of business?

A. I think Mr. Estabrook and some of the representatives of the Retail Clerks said that they didn't think they were.

Q. Did Mr. Estabrook or the Retail Clerks give any reason why they thought that the company was not paying comparable wages?

A. Well, when the wage scale was read that was in effect, we knew that the other wage scales we have in effect were much higher than that.

Mr. Ball: I move to strike what the witness knew.

The Witness: Well, I do know, to my knowledge.

Trial Examiner Bokat: Yes, that may be stricken.

The Witness: I do know, so far as I am concerned, that the wage rates are higher.

Mr. Ball: I move to strike that out.

Trial Examiner Bokat: Yes. We are interested in knowing if that was said.

Mr. Walker: I think that we would save time if the Examiner would let it stand for what it was worth.

Trial Examiner Bokat: I can't do that if an objection is made, and there is merit to the objection. [192]

(Testimony of Mark Holmes.)

That is the point that counsel desires to make, that he doesn't want it to stand in the record, and if he is right, I will have to rule. I want the conversation rather than the thoughts of the witness.

Mr. Walker: May I have the question read which was answered, and the answer was stricken?

Trial Examiner Bokat: Will you read it, Mr. Reporter?

(Thereupon the question and answer were read aloud by the reporter as follows:

“Q. Did Mr. Estabrook or the Retail Clerks give any reason why they thought that the company was not paying comparable wages?

“A. Well, when the wage scale was read that was in effect, we knew that the other wage scales we have in effect were much higher than that.”)

Q. (Mr. Walker, continuing) Was a wage scale read at this meeting?

A. At one of the meetings; I don't know whether you would call it a counter proposal, or whether it was just a wage scale that was read.

Q. What wage scale was it?

A. I don't understand your question.

Q. Whose wage scale was it?

A. It was Montgomery Ward & Company's wage scale; Montgomery Ward & Company was reading it to the union representatives. [193]

(Testimony of Mark Holmes.)

Q. Was it a scale of wages that Montgomery Ward were paying the employees at the time?

A. The question was asked Mr. Powell, and he said that was the wage scale that was being paid, and he said, in some cases that it was less.

Q. Had Local 206 membership in any other organization conducting a business comparable to Montgomery Ward & Company?

Mr. Ball: I will object to that as irrelevant.

Trial Examiner Bokat: I will let it stand as purely a preliminary question leading to something else. He may answer.

A. I would say "no".

Q. (Mr. Walker, continuing) Will you explain your previous answer?

A. I believe the name of Sears Roebuck has been mentioned, and we have a contract with them, but they are not in the mail order business here in the City of Portland.

Q. Was the matter of Sears Roebuck discussed in any of these meetings?

A. Not by myself.

Q. Did any of the representatives of the Union, Local 206, mention it?

A. I don't remember; I don't think so.

Q. Are there any businesses conducting warehouse businesses other than Montgomery Ward, situated in Portland?

Mr. Ball: I will object to that as irrelevant.

(Testimony of Mark Holmes.)

Trial Examiner Bokat: It will stand as a preliminary question.

The Witness: May I have the question again?

Mr. Walker: Will you read it?

Mr. Bokat: Read it back, Mr. Nelson, please.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Yes. I would say there are many, many businesses in Portland conducting warehouse activities.

Q. (Mr. Walker, continuing) Has Local 206 membership among any other businesses conducting warehouses in Portland?

A. Yes, we have contracts with about 122 concerns that do warehousing.

Trial Examiner Bokat: In the Portland area?

The Witness: Yes.

Q. (Mr. Walker, continuing) What is the relative wage scale of other warehousing businesses in Portland as compared with the warehouse employees of Montgomery Ward & Company?

Mr. Ball: I will object to that as irrelevant to any issues in this case. It is not preliminary, and it doesn't tend to prove or disprove any issues, but merely calls for an opinion of the witness.

Trial Examiner Bokat: I will sustain the objection. I am not going to get into a dispute as to the wages paid in other concerns, unless the particular subject was discussed [195] at the meeting.

It has already been testified to that the representative of the company stated they were paying

(Testimony of Mark Holmes.)

as high wages as any other concern, which, the witness states, was denied by the union. Now, if there was any further discussion, let us develop it.

Q. (Mr. Walker, continuing) Was there any discussion as to whether or not the Montgomery Ward wages were comparable with other warehouses businesses in Portland, on December 14?

Mr. Ball: I will object to that as irrelevant.

Trial Examiner Bokar: Was there any discussion as to comparative wages other than what you have told us?

The Witness: No, there was not.

Q. (Mr. Walker, continuing) Did the representatives of Local 206 meet again with representatives of the company following the meeting of the 14th?

Trial Examiner Bokar: It has been agreed that there was a meeting on December 16.

Q. (Mr. Walker, continuing) Were the same parties present at December 16? A. Yes.

Q. And was the contract discussed at the meeting of the 16th? A. It was.

Q. Was the form of the contract present before all of the parties in the meeting? [196]

A. There was one before each party.

Q. Was Mr. Ashe there also? A. He was.

Q. What took place at that meeting of the 16th?

A. A general discussion of the agreement, and questions by Mr. Ashe if the company desired to make any counter proposals.

(Testimony of Mark Holmes.)

Trial Examiner Bokat: And was there any reply, if you know?

The Witness: Nothing else, other than what I have stated.

Q. (Mr. Walker, continuing) All right, what was said about the agreement itself?

A. At the meeting, I think the question came up whether or not the company would arbitrate the contract.

Q. How did that question arise?

A. Well, we were not getting any place on the agreement, as a whole, and we wanted to find some common ground to settle the thing, if possible.

Mr. Ball: I don't want to burden this record, but, again, I must move to strike the answer, because it calls for a statement of mind.

Trial Examiner Bokat: I am compelled to grant the motion.

Q. (Mr. Walker, continuing) What was said along that line?

A. Mr. Estabrook asked Mr. Powell if he would agree to arbitration, and Mr. Powell said "no". Mr. Estabrook then asked Mr. Powell if he would sign an agreement with the same hours, wages and working conditions as had been in effect previous to the [197] strike, and Mr. Powell said "no".

Mr. Walker: That is all. Just a minute.

Q. (Mr. Walker, continuing) You mentioned Mr. Ashe taking part in the meeting?

A. Yes.

(Testimony of Mark Holmes.)

Q. What did Mr. Ashe say in the meeting of the 16th?

A. Well, he took part in the general discussion of the agreement, as to how we were going to get together on it.

Q. And what was it that he said in that regard?

A. He just took part in the discussion; I don't recall definitely.

Q. Do you recall what he said?

A. No, I don't recall what he said; I can't remember now.

Q. Do you recall whether or not Mr. Ashe made any inquiry concerning the question of seniority?

A. Yes, the question of seniority was discussed.

Q. And what was the discussion concerning that?

A. The discussion was that we asked if they would agree to a clause that had seniority in it, and they then said "no".

Q. Did they state why?

A. They said there was so many things that entered into seniority besides length of service, that they could not agree to it as written.

Q. That is Article 9 of the contract, is that correct?

A. That is correct. [198]

Q. Did Mr. Powell indicate what other matters entered into the question of seniority?

A. Whether or not the person involved was married, or his adaptability to promotion, or the type of work that he was doing.

Mr. Walker: That is all.

(Testimony of Mark Holmes.)

Mr. Ball: The respondent requests of the Trial Examiner, that if Mr. Landye is going to be permitted to examine the witness, that he require the examination to be ahead of the examination of the respondent. In that way only can orderly procedure be preserved, and if Mr. Landye has anything to bring out, I can then take it up on cross examination.

Mr. Landye: I agree to that, I think that is quite proper to examine the witness before the respondent, and, to make it entirely fair, I won't ask the witness any questions.

Cross Examination

Q. (Mr. Ball) When you get into a meeting to negotiate with an employer, you go in with a contract that has been approved by the union?

A. We do.

Q. And if any material changes are to be made in the proposed agreement, you have the authority to sign it?

A. Not at that time.

Q. You would have to take it back to the membership?

A. It all depends on whether we have anything to take back. [199]

Q. But any material change, you would have to take that back to the membership?

A. If the change was made in writing and given to us, I think that that would be the procedure.

Mr. Ball: I move to strike the answer as not responsive.

(Testimony of Mark Holmes.)

Trial Examiner Bokar: Yes. Strike it.

Q. (Mr. Ball, continuing) You couldn't sign a contract on behalf of your union that involved any material changes, without going back to the membership?

A. We would not.

Q. That would be the practice of the union?

A. Yes.

Q. And what would apply to you would apply to Mr. Estabrook, also?

A. Yes.

Q. Now, altogether, the meetings that you spent with Montgomery Ward & Company took a good many hours?

A. Yes.

Q. As a matter of fact, you don't recall the exact words used in the framing of any question or answer?

A. That would be pretty hard to do.

Q. Your answers have been based mostly on your general recollection of the tenor of the conversations?

A. That is what I think that they would be based on, what I remember, yes. [200]

Q. You will recall that in the discussion of the contract, you testified that Mr. Estabrook asked Mr. Powell if he would sign a contract which embodied an open shop and the existing wage rate?

A. Yes, I believe that question was asked.

Q. You recall that Mr. Denecke asked you if your union would sign such a contract?

A. I don't recall that, no.

(Testimony of Mark Holmes.)

Q. You recall that the statement was made that your union would not sign such an agreement?

A. The statement was not made by myself, so I wouldn't know.

Q. It might have been made, so far as your present recollection is concerned?

A. I have a pretty good memory, but I don't remember that being made.

Mr. Ball: That is all.

Trial Examiner Bokat: Any redirect?

Mr. Walker: No.

Trial Examiner Bokat: The witness is excused.

(Witness excused)

Mr. Ball: May I recall the witness for one question?

Trial Examiner Bokat: Yes.

MARK HOLMES,

previously sworn, was recalled as a witness by and on behalf of the Board and further testified as follows: [201]

Cross Examination

(continued)

Q. (Mr. Ball) You recall that the question was asked of Mr. Powell about the signing of a contract or an agreement, and he said, "it is premature to discuss the final form of contract until we have agreed on all the terms"?

(Testimony of Mark Holmes.)

A. I don't remember Mr. Powell making any such statement.

Mr. Ball: That is all.

(Witness excused)

Mr. Walker: Mr. Dixon.

FRED DIXON

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: Fred Dixon.

Trial Examiner Bokat: How do you spell your name?

The Witness: D-i-x-o-n (spelling).

Trial Examiner Bokat: Your first name is Fred?

The Witness: Yes.

Direct Examination

Q. (Mr. Walker) What is your official position?
A. Secretary-Treasurer.

Q. Of what?

A. Retail Clerks' Local 1257.

Q. Are the Retail Clerks affiliated with any national or [202] international?

A. Yes, the Retail Clerks' International Protective Association.

(Testimony of Fred Dixon.)

Q. And is the International affiliated with any other labor organization?

A. It is affiliated with the American Federation of Labor.

Q. When was Local 1257 chartered?

A. In the year 1917.

Q. Does the Retail Clerks' Union claim membership amongst the employees of Montgomery Ward & Company?

A. Yes.

Q. What classes of employees are eligible for membership in Local 1257?

A. What classes?

Q. Yes.

A. Do you want me to give a complete definition of the type of people that we take in?

Q. Yes.

A. We take people in selling and non-selling where they are engaged in the operation of a retail establishment. In non-selling, we claim people that are affected by the selling people, such as the service or more or less stock work in a retail establishment.

Trial Examiner Bokar: You say, employees, for example, who wrap parcels are eligible to membership in your organization? [203]

The Witness: Yes, in the retail.

Q. (Mr. Walker) By "selling", you mean such individuals as are commonly engaged in waiting on customers, displaying goods to them, and executing transfer of goods for sale?

A. Yes.

(Testimony of Fred Dixon.)

Mr. Ball: I suggest that the witness speak up, rather than nod his head.

A. (Continuing) Yes.

Q. (Mr. Walker) Does that same definition that you have just given relative to selling and non-selling apply to the Montgomery Ward establishment here in Portland? A. Yes.

Q. What classes of employees at the Montgomery Ward establishment are not eligible for membership in Local 1257?

A. You mean in the retail store?

Q. Yes.

A. They have watchmakers, tailors, supervisors, doormen. I can't think of all of them, but there are a large number of them not eligible to membership.

Trial Examiner Bokar: I would like to get them all.

Q. (Mr. Walker, continuing) In your answer, you referred to the retail store. Is your membership limited among selling and non-selling employees solely in the retail store division, or otherwise?

A. Yes, it is limited solely to that. [204]

Q. Are employees of other organizations members of your organization, in addition to employees of Montgomery Ward? A. How is that?

Q. Are employees of other organizations, in addition to Montgomery Ward, a part of the membership of Local 1257?

A. I still don't understand it.

(Testimony of Fred Dixon.)

Q. Is membership in 1257 limited to employees of Montgomery Ward only?

A. No. We have membership anywhere, wherever there is a retail establishment.

Q. In the City of Portland? A. Yes.

Q. In speaking of individuals who are eligible for membership, you mentioned supervisors. What do you mean by the term "supervisors"?

A. Generally, after entering into a contract, it is generally agreed upon between the union and the employer as to what constitutes a supervisor. In various cases, they have different interpretations of what a supervisor is, and we mutually agree upon the term as to who is a supervisor, after a contract is entered into. They are never the same in any two establishments in the country.

Q. When did Local 1257 begin organizing the employees of Montgomery Ward?

A. I couldn't say the exact date. It was around February or March [205] of 1940. We started jointly with Estabrook's.

Q. You mean Estabrook's organization campaign; is that what you mean? A. Yes.

Q. That is, Local 206 of the Warehousemen?

A. Yes.

Q. After beginning organization at Montgomery Ward, did you have occasion to contact any of the officials of Montgomery Ward? A. Yes.

Q. Who?

(Testimony of Fred Dixon.)

A. We had a meeting with Mr. Huddleston and Mr. Barth stating that we had started a campaign to organize the store. We approached them before the organizational drive started.

We informed them of our intention, that it was to be strictly on an honorable basis, and we asked what was going to be their position. They said that they were compelled by law to deal with us after we got 51 per cent, and that they would not do anything to in any way hamper the organization, and that after we got 51 per cent, they would have to deal with us. Of course, they stated that it would be up to us to notify them.

Trial Examiner Bokat: Do you intend to introduce any further proof along that line, Mr. Walker?

Mr. Walker: Yes. [206]

Trial Examiner Bokat: Otherwise, I have some questions of the witness.

Mr. Walker: Oh, yes.

Q. (Mr. Walker, continuing) How did you first notify the company representatives relative to the results of your organizational campaign?

A. Well, after we had obtained a majority of the employees, we had a general meeting of the employees, and we discussed what we would do, or should do.

We had drafted our agreement, and we were to determine what date we should notify the company, so we set the date as the 6th day of August; and we sent them a letter to that effect.

(Testimony of Fred Dixon.)

Q. Have you a copy of that letter?

A. Yes.

Mr. Ball: I move to strike that portion of the testimony that stated, "After we obtained a majority of the employees" or "51 per cent", because there is no proof of a majority. That is a conclusion of the witness.

Trial Examiner Bokar: The mere statement that they had a majority is not decisive, of course.

Mr. Ball: And may I add to my objection that it is a conclusion of the witness.

Trial Examiner Bokar: I think that you already stated that. [207]

Let it be understood that any reference of this and other witnesses that may be made generally about the Retail Clerks having a majority in the appropriate unit, is merely the claim of the union, and the statement will be received as such, subject to the actual proof that the union had the majority, the actual proof as against the claim of the union.

Mr. Ball: Thank you.

(Thereupon documents were marked as Board's Exhibits 4, 5 and 6, respectively, for identification.)

Mr. Ball: Let the record show that Board's Exhibits 4, 5 and 6, are copies of correspondence passing between the parties, and that Board's Exhibit 5 is the same as Respondent's Exhibit No. 4, marked for identification yesterday and not offered at that time.

(Testimony of Fred Dixon.)

Q. (Mr. Walker, continuing) Mr. Dixon, I hand you what has been marked as Board's Exhibit 4, and also what has been marked as Board's Exhibits 5 and 6, and I will ask you to state what they are.

Mr. Ball: Why don't you introduce them into evidence and we will have no objection.

Trial Examiner Bokat: If counsel has no objection to their introduction, it obviates the necessity of laying a foundation.

Mr. Walker: Without further identification, on agreement between counsel that they may be received in evidence without further identification, I will offer in evidence what have been [208] marked as Board's Exhibits 4, 5 and 6.

Trial Examiner Bokat: They will be received in evidence.

(Whereupon the documents heretofore marked, respectively, Board's Exhibits 4, 5 and 6 for identification, were received in evidence.)

BOARD'S EXHIBIT No. 4

[Copy]

August 6, 1940

Montgomery Ward & Co.
Portland, Oregon
Attention Mr. E. L. Barth

Dear Sir:

This is to notify you that we have at the present time a large majority of the Retail Clerks employed

(Testimony of Fred Dixon.)

in your store, that have signified by their applications that we are to represent them as their Collective Bargaining Agent.

In view of the above, we request that at your earliest convenience we meet to discuss and negotiate a mutually satisfactory Agreement, covering Hours, Wages, and Working Conditions for this group.

Thanking you for an early reply, we are,

Very truly yours

RETAIL CLERKS LOCAL No. 1257

FRED DIXON,

Sec'y & Business Rep.

(Seal)

FD/lb

BOARD'S EXHIBIT No. 5

[Copy]

Montgomery Ward

Portland, Oregon

August 12, 1940

Mr. Fred Dixon

Retail Clerks, Local Union #1257

404 Labor Temple

Portland, Oregon

Dear Mr. Dixon:

This will acknowledge your letter requesting a meeting with me. I shall be glad to arrange for

(Testimony of Fred Dixon.)

discussion of any subjects in which you may be interested at any time that is mutually convenient.

Yours very truly,

MONTGOMERY WARD & CO.

(Signed) E. L. BARTH

Retail Store Manager

B:N

BOARD'S EXHIBIT No. 6

[Copy]

October 2nd, 1940

E. L. Barth, Local Manager

Montgomery Ward & Co.

2741 N. W. Vaughn Street

Portland, Oregon

Dear Sir:

As you know, the Retail Clerks Union, Local 1257, represents an overwhelming majority of your employes engaged in retail selling in your retail store at Portland, Oregon, also the Office Employees Union, No. 16821, represents a great majority of your office workers in the retail store.

This is to notify you that we are willing to negotiate a contract for the entire retail store. We are agreeable that the negotiations cover the office workers as well as the retail clerk's that one contract be signed covering the entire retail store, and that such contract will be negotiated by both unions in-

(Testimony of Fred Dixon.)

volved at one time, and if an agreement can be reached it will be signed by both unions involved.

Yours very truly,

RETAIL CLERKS UNION

LOCAL 1257

FRED DIXON,

Secretary

OFFICE EMPLOYEES UNION

LOCAL 16821

HOWARD HICKS,

Secretary

FD:HH:JS

Mr. Ball: It is, of course, understood that, in our not objecting, we do not accept the probative effect of the evidence other than the fact that the letters were written.

Trial Examiner Bokat: Of course.

Q. (Mr. Walker, continuing) After receiving the letter from the company, dated August 12, did Local 1257 do anything? A. Yes.

Q. What?

A. We contacted Mr. Barth by telephone and asked him to arrange a meeting where we could get together and discuss the contract.

Q. Were arrangements made?

A. Yes, he arranged for a meeting. I don't recall the exact date. He was to arrange a meeting

(Testimony of Fred Dixon.)

with Mr. Powell, and then he was to notify me of the date that Mr. Powell could be here, and where we were to meet.

Q. Did he later interview you again?

A. Yes, he did.

Q. Did he notify you of Mr. Powell coming here?

A. Yes. [209]

Q. And did you later meet?

A. Yes.

Q. When was that meeting?

A. It was in September; I don't recall the exact date.

Q. September 19?

A. Yes, I believe so.

Q. Where?

A. In the New Heathman Hotel,—no, the Heathman Hotel.

Q. Did anybody accompany you?

A. Mr. Landye.

Q. With whom did you meet?

A. An attorney of Montgomery Ward & Company from Oakland, Mr. Powell,—a Mr. Barr.

Mr. Ball: In order that the record may be correct, the Mr. Barr referred to by the witness is Mr. J. P. Barr, and he is not an attorney, but is a regional office representative of the company at Oakland, and is not the same Mr. Barr who is a representative and counsel for our company from Chicago.

(Testimony of Fred Dixon.)

Mr. Landye: That is correct.

(Whereupon a document was marked as Board's Exhibit 7 for identification.)

Q. (Mr. Walker, continuing) In your previous answer concerning the conversation with Mr. Barth, you mentioned a contract. Will you refer to what has been marked as Board's Exhibit 7 for identification and state what that is? [210]

A. It is a contract with Montgomery Ward & Company.

Q. When was it submitted to the company?

A. Oh, I couldn't say exactly. I had it delivered by messenger. I would have the date up at the office. I called the messenger and had it delivered to Mr. Barth.

Q. Approximately when was that?

A. It was in August sometime.

Q. August?

A. The latter part of August.

Q. 1940? A. Yes.

Q. When was the form of agreement first formulated or drawn? A. In July and August.

Q. Now, what occurred at the meeting at the Heathman Hotel on September 19?

A. On September 19, we opened up the meeting after discussion about getting acquainted, and who represented who, and we started out and gave copies of the contract to all parties present at the meeting.

And immediately after the meeting started, why

(Testimony of Fred Dixon.)

Mr. Powell brought up the point that they reserve the right to go into negotiations or discussions,—however, he stated that at a later date he would reserve the right to question us whether or not we did represent a majority or not. At that point, I immediately brought up the fact that, when we go into negotiations [211] with employers, the first thing to be determined before we go into negotiations and before we can negotiate for any working agreement, it must be conceded that we have a majority. If the company says that we do not represent the majority, then that point has to be determined first before we start negotiations.

And after a long discussion on it, Mr. Landye and myself made three proposals to determine that question: to either hold an election or to get an outsider to audit the payroll against our membership, or they could accept us by the letter that we had sent them stating that we had the majority, or that we represented the majority.

Q. Now, after that meeting, or after the meeting at which that matter of the three alternatives was discussed, did you again hear from Mr. Barth?

A. Yes. The only thing is that, after this meeting broke up, when we adjourned at this meeting, they were to notify us as to what position they wanted to take, whether they wanted an election or whether they wanted a certification by the National Labor Relations Board to check the payroll, or to accept it; and they were to give us an answer.

(Testimony of Fred Dixon.)

Q. And did they say that they would later give you an answer?

A. Yes, they said that they would give us an answer.

Q. And did you later get an answer?

A. Well, they sent us a letter requesting that we could bargain [212] for the entire unit.

Trial Examiner Bokar: What unit are you referring to?

The Witness: The unit as a whole. That, if we could bargain for the unit, including the office workers; at that time, I stated that we had no right to bargain for the officer workers, because they were a different organization, and we had no right to deal for the office employees; however, we agreed at this meeting that I would try to persuade the office workers to give us the right to bargain, with the understanding that they still belonged to that union; and then they asked us to give them a letter in writing as to that; which we did.

Q. Well, now, at the close of that meeting, the representative of the company was to notify you as to which one of the three proposals they would agree to; is that correct? A. Yes.

Q. And were you later notified which one of the three proposals was agreeable?

A. No. I was notified by telephone that they were arranging for another meeting, and I asked them if that point was clear.

Q. Who was it that you asked?

(Testimony of Fred Dixon.)

A. Mr. Barth; and I talked with Mr. Barth on the telephone, and he asked about arrangements for this other meeting, and he made arrangements for the time, and we met in the Heathman Hotel. There were Hicks, the Office Workers' Representative, and Max Langford, our International Representative. At that meeting, [213] I asked them if they would accept our letter.

Q. That is the letter of October 2, 1940?

A. Yes.

Trial Examiner Bokat: That is Board's Exhibit 6.

Let's see if I can get the sequence of events more clearly in mind, if you don't mind, Mr. Walker.

Mr. Walker: That is all right.

Trial Examiner Bokat: You met with certain representatives of the Company on September 19?

A. That is right.

Q. (Trial Examiner Bokat) At which time the question of the Union's majority was discussed, is that right? A. Yes.

Q. And the union made three proposals?

A. Three proposals as to the way that they could determine the majority.

Q. When you say "election", were you referring to a consent election under the auspices of the Labor Board? A. Yes.

Trial Examiner Bokat: Is that the kind of election that you were referring to?

The Witness: Yes.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: You say that you received a reply to the proposals by telephone after the September 9 meeting?

The Witness: Yes.

Trial Examiner Bokat: From Mr. Barth? [214]

The Witness: Yes.

Trial Examiner Bokat: About when did you receive the telephone call?

The Witness: I couldn't say exactly. I could check back.

Trial Examiner Bokat: Well, approximately. Was it a week or two after this meeting of September 19, or a few days after that?

The Witness: Well, it was in the latter part of September when I got the reply.

Trial Examiner Bokat: What was the reply? I want you to clarify that for me.

The Witness: Mr. Barth said that would have to be taken up with Mr. Powell, and he wanted to arrange for a meeting.

Trial Examiner Bokat: For another meeting?

The Witness: Yes.

Trial Examiner Bokat: On the three proposals?

The Witness: Yes, to determine whether we had a majority or not.

Trial Examiner Bokat: Was that meeting arranged?

The Witness: It was arranged.

Trial Examiner Bokat: When did it take place?

(Testimony of Fred Dixon.)

The Witness: It took place in October. I don't recall just the date.

Mr. Ball: The meeting at which Mr. Hicks, Mr. Langford, Mr. Dixon, Mr. Barth and Mr. Powell were present, took place [215] October 22. Can we settle that for the record?

The Witness: Yes, I believe that is right.

Trial Examiner Bokat: When did this suggestion originate, the question of including the office workers and the retail clerks into one unit; when did that come up?

The Witness: The Company requested that we get permission to represent the office workers in unit, so that there would be one organization to sign the contract for the entire unit.

Trial Examiner Bokat: Where would the majority be determined? Would it be determined in the larger unit, or was it to be determined separately for the Retail Clerks and separately for the Office Workers?

The Witness: Both were separate.

Trial Examiner Bokat: That was the understanding reached by the parties, or between the parties?

The Witness: Yes.

Trial Examiner Bokat: That the majority would be determined separately in each of the so-called units?

I want to get that clear.

The Witness: I want to get my position clear, too. We were only speaking for our people, but the

(Testimony of Fred Dixon.)

company suggested that we bargain for both parties. And the Office Workers had a majority of the office workers in the retail establishment at that time. The company asked us to get permission for [216] us to deal for the office workers in collective bargaining.

Trial Examiner Bokat: Now, with reference to the three alternatives in proving the majority, that related solely to the Retail Clerks?

The Witness: That is right.

Trial Examiner Bokat: Proceed.

Q. (Mr. Walker, continuing) When Mr. Powell referred to the retail store, in what manner did he describe the store? As a whole?

A. He described it as a unit, and everything in the retail store was one unit.

Q. When you have used the word "unit", in what sense have you used it? Have you used it in a quotation of Mr. Powell's?

A. Yes, in a quotation of Mr. Powell's.

Q. What discussion did you have relative to the jurisdiction of the Office Workers and the jurisdiction of the Retail Clerks?

A. Will you repeat the question?

Q. Previously, in your direct examination, you stated that you explained to Mr. Powell to what extent the Retail Clerks claimed representation, and what the difference was between the Retail Clerks and the Office Workers. Now, will you state what you said to Mr. Powell in that regard?

(Testimony of Fred Dixon.)

A. I stated to Mr. Powell that we represented, so far as the Retail Clerks were concerned, at least 85 per cent. of the people [217] in that unit, and that the Office Workers, to my knowledge, were 75 per cent. if not better, organized in the retail store. And then they asked us if we would not go and get the permission of the Office Workers, and then send them a letter that we had the right to bargain for those people. Then, of course, we suggested that we adjourn the meeting and we try to do that, if they was what they wanted. Mr. Powell agreed that we should go back and do that, and then let them know later.

Q. You stated to Mr. Powell that you represented 85 per cent. of your people?

A. Yes.

Q. Was there any discussion about the kind of people that you represented?

A. Yes, I stated the type of people that came under our jurisdiction.

Q. What was it that you told him?

A. Sales people and non-selling people that came under the category of our International Constitution.

Trial Examiner Bokar: At this time we will recess for lunch until 1:10 p.m.

(At 12:10 p.m. hearing recessed until 1:10 p.m.)

[218]

(Testimony of Fred Dixon.)

Afternoon Session

(Whereupon, at 1:15 p.m. the hearing was continued, pursuant to the taking of noon recess, as follows:)

Trial Examiner Bokat: The hearing will please come to order.

Q. (Mr. Walker, continuing) Mr. Dixon, I don't recall whether you have testified to this or not. But will you state whether or not a form of Board's Exhibit 7,—that is the agreement,—was delivered to any of the representatives of Montgomery Ward & Company?

A. Was it delivered to any of the—yes, it was delivered by messenger in August to Mr. Barth.

Trial Examiner Bokat: Barth, that is spelled B-a-r-t-h? (spelling)

The Witness: Yes.

Trial Examiner Bokat: Let's proceed.

Q. (Mr. Walker continuing) Now, at this meeting in the Heathman Hotel on September 19, was there any discussion about entering into an agreement of any kind?

A. That is the first meeting we had? You are referring to the first meeting?

Q. Yes.

A. Well, at that time,—as I said previously—they questioned the representation, whether we represented the majority or not. [219]

Q. Yes.

(Testimony of Fred Dixon.)

A. And I told them I could not discuss a contract with people unless they accepted our organization, that we represented the majority. We couldn't deal with people that,—didn't know who we were dealing for. Either the company had to accept or reject us so we could figure what our next move would be. It went on for several hours, and Mr. Landye and myself kept selling the point that they could use either of the methods I have described before of determining whether we represented the majority or not.

Q. Now, was any inquiry made as to whether or not it was possible to reach any agreement on any question?

A. Well, I recall of asking Mr. Powell that if we did reach an agreement with them, were they in a position to sign an agreement; and he told me that they didn't sign any agreements; and I stated that we had retail stores that I was confident that had signed agreements,—with Montgomery Ward & Company,—and he stated to his knowledge that they had no signed agreements, that they never signed any agreements.

Q. Was there anything else took place at that meeting of September 19th?

A. Oh, there took place this,—trying to bargain for these other people, the Office Workers,—it went on with a lengthy discussion about them. I said we should get the Office Workers to consent to come in

(Testimony of Fred Dixon.)

and join negotiations [220] with us and finish the unit at one time.

Q. Was that done?

A. That was done, yes. We sent them a letter jointly with the Office Workers and the Clerks, stating that we would negotiate jointly with the Office Workers and the Retail Clerks.

Q. Now, that letter that you have just referred to is the one marked Board's Exhibit 6, dated October 2, 1940? A. Yes.

Q. After delivering that letter to respondent, did you have any further contact with them?

A. Before I answer that question, I would like to go back on about this bargaining. We set a date when they were to reply to us whether they accepted us or rejected us on the terms that we proposed,—we met on the 19th and set the date as Monday the 23rd and we asked them,—they should be able to get together in a couple of days,—and Powell agreed, and Barth, that Monday the 23rd would be satisfactory; they would have an answer to us by that time.

Q. This discussion took place during the course of the meeting of the 19th? A. Yes.

Q. Go ahead.

A. What was the question you just asked?

Q. What occurred on the 23rd, if anything?

[221]

(Testimony of Fred Dixon.)

A. I called up Mr. Barth to find out what the company's answer was, and he wanted to know if I was able to get that letter to them,—by these Office Workers,—and I said, “Yes”, we was mailing this letter to him. He said as soon as he received that letter he would forward the letter right to Mr. Powell, who would be the man that would answer us.

Mr. Ball: That letter being Exhibit,—

Mr. Walker: 6.

Trial Examiner Bokat: Board's 6.

Q. (Mr. Walker, continuing) Did you subsequently receive any word from Mr. Powell concerning that letter of the 2nd of October?

A. I didn't receive any from Powell. I received a telephone conversation from Mr. Barth.

Q. About how long was that after October 2nd?

A. Oh, I would say, roughly speaking, a week or ten days.

Q. What did Mr. Barth tell you?

A. He said that he had either a letter or a telephone conversation with Mr. Powell and that he was in Southern Oregon,—he would be in Southern Oregon or some part of the state,—and he wanted to arrange for a meeting to be here in October. He wanted to know if the date was satisfactory to me, and I said anytime was satisfactory to me, as long as we knew what time we were going to meet. At a later date, why, he said he would call me up on the exact date and the place where we will [222]

(Testimony of Fred Dixon.)

meet; and he later called me up and arranged for this meeting in October in the Heathman Hotel.

Q. Between the conversation of September 23rd and the actual convening of the meeting of October 22nd, did you hear anything further from either Mr. Barth or Mr. Powell about the letter of October 2nd? A. No, I didn't.

Q. Now, where was your meeting held in October?

A. The meeting was held in the same room in the Heathman Hotel,—I don't recall whether it was the same room or not,—but the Heathman Hotel.

Q. Who represented the Unions at that time?

A. I represented the Clerks, and Langford, our International representative, was with us; Howard Hicks of the Office Workers was there.

Trial Examiner Bokat: How do you spell it? H-i-c-k-s?

The Witness: H-i-c-k-s (spelling). And Barth represented Montgomery Ward, and Mr. Powell.

Q. Was a form of Board's Exhibit 7 before the parties at that meeting?

A. Contract, yes.

Q. Will you relate, in your own words, what took place at that meeting?

A. Well, as soon as we got started I asked Mr. Powell if the letter that we had sent to them was satisfactory, were they [223] ready, at this time, to accept us and go into negotiations. Mr. Powell said, "At this time we accept that you do represent the

(Testimony of Fred Dixon.)

majority and we are ready to continue in negotiations."

Q. What letter were you referring to?

A. The letter that Howard Hicks and myself sent.

Q. What happened after that?

A. Then we started in on the contract.

Q. How did you go about discussing the contract?

A. We got into the first paragraph of the contract and we got stuck.

(Discussion off the record.)

Q. (Mr. Walker continuing) What was said about the first clause of the agreement?

A. The first,—as we refer to it as section,—the first section of the agreement.

Q. The one that is marked Section 1?

A. Yes.

Q. All right.

A. Where it proves that the employer shall be entitled to hire any employee with the understanding that, after a certain length of time, if they are not members of the union, the company agrees that they shall become members if they are satisfactory to the employer and to the union. Mr. Powell said he could not agree upon anything like that, because it was contrary to company policy; that they weren't going to compel [224] anybody to belong to a union in order to have employment with Montgomery Ward & Company. I took up the argument that they had various things that were contrary to

(Testimony of Fred Dixon.)

whether the employees wanted to belong to them, but they had to in order to hold their job. We had contracts with all employers having the same clause, and we have no difficulty with the employers concerning that section. I related to Mr. Powell about various things that they compelled their employees to take out, whether they actually wanted to or not, and they weren't concerned about their employees on that. That was company policy, and why couldn't they make this company policy. Mr. Powell said that they absolutely couldn't go for it; at least, they wouldn't go for it at that time. So I asked him if he was in a position to give us a substitute for that, and he said, "No," he would not give us a substitute; and I said, "After all, if we get stuck on any of these things, we either have to be in a position to modify them and take them back to the people and——

Q. (Interposing) What people? What do you mean?

A. The people I represent, the employees. I asked him to submit us a counter proposal, seeing we were getting stuck. And I noticed that their copy was all written over with pencil with rejections noted. I stated that I would like the company to sit down and give us a proposal; that we weren't getting anyplace. Give us a proposal we could take back and [225] call a meeting of the employees and see how far they would go in accepting the various proposals the company would make.

(Testimony of Fred Dixon.)

Mr. Ball: Just a minute. I move to strike out the answer of the witness on the ground that it states opinions and conclusions of the witness, especially that portion that relates to the words "counter proposal", as the context of his answer and the meaning of these specific words here used is not clear; and the words involve a conclusion of the witness.

And for the further reason that commenting about what he saw on the copy of the contract in the hands of the respondent is also an opinion and conclusion of the witness.

Mr. Walker: May I ask one question before you rule on it?

Trial Examiner Bokat: Yes. Go ahead.

Q. (Mr. Walker, continuing) What you have just now related, is that what you stated during the course of the meeting? A. Yes.

Trial Examiner Bokat: Who did you say it to?

The Witness: Mr. Powell.

Trial Examiner Bokat: Did you say to Mr. Powell that you noticed that the contract in the possession of Mr. Powell had rejections on it?

The Witness: I stated to him that it was all penciled. It looked like the articles that we had submitted were either to be modified,—I thought if it was so many objections or [226] modifications in it, we would like to have a counter proposal.

Trial Examiner Bokat: Did you use the words "counter proposal"?

(Testimony of Fred Dixon.)

The Witness: Yes.

Trial Examiner Bokat: I think that you have run a little ahead of your story, because you seem to refer to all the articles, when, as a matter of fact, the question was merely directed to Section 1.

The Witness: Section 1 is where we got stuck to begin with. That is as far as we got at that time.

Trial Examiner Bokat: That is as far as you got at that time?

The Witness: Yes, that is as far as we got at that time.

Trial Examiner Bokat: In view of the further answer of the witness, I will let his testimony stand.

As I say again, it is very difficult to separate some of the conclusions, which, I admit, the witness did throw into his answer, from the fact. I will give due weight to all of the testimony.

Mr. Ball: It is understood my objection applies to all the answers that he gave in amplifying the original answer, or, rather, the questions?

Trial Examiner Bokat: Yes.

Mr. Ball: And a further objection should be entered to that line of questioning as incompetent and irrelevant, not [227] tending to prove or disprove any of the issues in this case.

Trial Examiner Bokat: Overruled.

Q. (Mr. Walker continuing) In the course of your previous answer you related that you mentioned to Mr. Powell various things that were required to be done by the employees. What were the various things that you mentioned?

(Testimony of Fred Dixon.)

A. I don't quite,—

Q. All right. In the course of your previous answer you stated that Mr. Powell expressed the thought that Section 1 of the agreement was not acceptable because it would require their employees to take membership in a union. To that you stated to Mr. Powell that there were many things that the company required the employees to do which they may or may not have wanted to do. Now, what were some of the various things required to be done by the employees that you mentioned to Mr. Powell?

A. Well, I stated that they have set-ups where the men must take out insurance, whether he wants to or not, to be employed by Montgomery Ward; that he must subscribe to sick benefits, whether he desires to subscribe to it or not,—a matter of policy with the company,—in order to be employed by the company; that they must take out these various policies or the company won't employ them.

Mr. Ball: May I point out again to the Examiner, I think we are getting on matters that are entirely collateral. Just [228] for the sake of the record, I move to strike the witness' answer on the ground that the matters referred to have no tendency to prove or disprove any of the issues in this case.

Trial Examiner Bokar: That may be true, but I will let it stand. It is very difficult for me at this time to determine whether what conversation took place will aid me in determining whether or not

(Testimony of Fred Dixon.)

respondent refused to bargain collectively in this case. I will have to let it stand, at this time.

Q. (Mr. Walker continuing) What you have just now related, was that something you said during the course of negotiations on October 22nd?

Trial Examiner Bokat: There is no question about it.

Mr. Walker: There seems to be a question.

Trial Examiner Bokat: Objection is made, even though it was said, it is immaterial.

Mr. Walker: What difference does that make?

Trial Examiner Bokat: It makes a lot of difference. It is very true a lot of these negotiations and transactions may or may not aid the Board in determining whether respondent bargained collectively; but it is too early for me to determine whether that particular testimony to which objection was made is relevant or not. I am letting it stand in the meantime.

Q. (Mr. Walker continuing) Now, were there any other sections of the agreement discussed at that meeting? [229]

A. No, there wasn't.

Q. Have you related all of the discussion that took place relative to Section 1 of the agreement?

A. No. We went on for about seven hours.

Q. What else was said in addition to what you have already related?

A. Well, we went right through the history of

(Testimony of Fred Dixon.)

our relations with employers that were working under that section.

Q. What was said in that regard?

A. Well, we offered to substantiate proof—to bring about proof of various employers that had worked under there. We didn't compel an employee to become a member if his religion or something prohibited him from becoming a member of organized labor. We worked that problem out between the employer and the party involved and the union. I cited various cases we had run into where their religion prohibited them belonging to the union. We worked it out with the employer. I was willing to produce those employers as witnesses to state our case. I said that we weren't iron clad on it. We wanted it to be a matter of policy. We were lenient if there was any case like that, as where Mr. Powell stated, "We might have some employees that would object to it." That problem,—we have always been able to iron that out since 1917, since our organization has been in existence.

Q. Did Mr. Powell say anything to that? [230]

A. No,—I don't recall exactly, if he did or not.

Trial Examiner Bokar: How did the meeting wind up?

The Witness: The meeting wound up at night, about 6:30, or somewhere around that neighborhood, with Powell, and Mr. Barth, and myself being present at the meeting; the rest of the boys had gone home. They had to leave for some other appoint-

(Testimony of Fred Dixon.)

ment, or something. We wound up that night with the understanding that Barth and Powell would get together and consider the proposition of giving us this counter proposal.

Trial Examiner Bokat: Merely on Section 1, or on the entire proposed contract?

The Witness: On the entire proposed contract.

Trial Examiner Bokat: Had you asked for a counter proposal on the entire contract, or merely on Section 1?

The Witness: Yes; so we would have some way of knowing what our differences were, so we could start from there instead of trying to work and not knowing exactly how far apart we were. That was just the procedure with our unions. If we could not get started with the contract, automatically the employer gave us a counter proposal, and you work from there on.

Trial Examiner Bokat: You asked for a counter proposal, you say, and Mr. Powell and Mr. Barth told you they were considering whether to submit a counter proposal or not?

The Witness: Yes.

Trial Examiner Bokat: Proceed. [231]

Q. (Mr. Walker continuing) Now, in the course of discussing whether or not a counter proposal would be delivered to you, did you tell Mr. Powell of the previous practice of your organization, as you related it in your previous answer?

A. Yes.

(Testimony of Fred Dixon.)

Q. Did you have any further contact with either Mr. Powell or Mr. Barth after that meeting?

A. Yes. I called Mr. Powell at the Heathman Hotel,—

Q. (Interposing) When?

A. I don't recall whether it was the following day, but I know that he was leaving town. You probably would have the dates better than I would. He was just leaving town; just leaving the hotel, in fact. They paged him from the lobby and called him back to the 'phone. He told me a cab was waiting outside for him, and that he would call me back from the airport, which he did.

Q. Did you talk to him at that time, from the airport? A. Yes.

Q. What was said?

A. I was talking on that counter proposal.

Q. What did you say?

A. I asked him,—in fact, I had to clarify my position as to what we meant by a counter proposal.

Q. What did you say to him?

A. I told him by counter proposal,—we had submitted our [232] contract; they had a copy of our contract,—if there was any difference in the contract, they felt they could offer us some exchanges in what we were asking, if they would sit down and work out a contract that they felt they could operate under, and submit to us that counter proposal; and we would call a meeting of our people and see how far we could get with that contract.

(Testimony of Fred Dixon.)

Q. Did he say anything?

A. Well, he said he would give it consideration, and that he would keep in touch with Mr. Barth.

Q. Was that all of that conversation?

A. Yes. His plane was leaving, so he had to go to the plane.

Q. Did you hear from Mr. Barth after that?

A. I called up Mr. Barth several times; we had various telephone conversations,—I don't recall all of them. We kept in contact there about every other day.

Q. Did you hear,—

A. (Interrupting) I tried to find out whether we could arrange for another meeting, or if they could get this counter proposal to us.

Q. Did you hear from Mr. Barth again concerning the requested counter proposal? A. No.

Q. Did he inform you at all what decision had been reached by Mr. Powell? [233]

A. No, he didn't.

Q. Did you meet again with the representatives of the company following October 22nd?

A. No. I never met at all until after the strike. I would like to state that,—

Q. (Interrupting) Were you,—excuse me. Go ahead.

A. I forgot what I was going to say, now. Oh,—Mr. Powell made the statement, when I asked him for a counter proposal, that he could not see why they had to give us a counter proposal, because

(Testimony of Fred Dixon.)

they weren't asking anything from the union while the union was asking from them. He couldn't see any sense in them giving us a counter proposal.

Trial Examiner Bokat: When did he say that?

The Witness: At the course of this meeting on the 23rd,—the second meeting we had.

Trial Examiner Bokat: That was on October 22nd.

The Witness: Over the telephone from the airport, too.

Trial Examiner Bokat: The same thing?

The Witness: He referred to the same thing, our insisting on a counter proposal.

Q. (Mr. Walker continuing) Did you say that you did not have any more meetings until the meetings of December?

A. I kept in touch with Mr. Barth. I wanted to know why we couldn't have another meeting, and Mr. Barth,—

Q. (Interrupting) You mean, you asked him? [234]

A. Yes. He said he was trying,—in fact, he had been in contact with Mr. Powell, either by long distance or by letter, I don't recall which it was.

Q. Did he tell you,—

Mr. Ball: (Interrupting) Just a minute. I move to strike out the answer of the witness unless he fixes a date more specifically. It is a general statement which we can't cross examine on.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: Will you read the last question and answer, Mr. Reporter?

(Whereupon the last question and answer referred to were read aloud by the reporter as above recorded.)

Trial Examiner Bokat: When did these conversations take place with Mr. Barth?

The Witness: I have my records, if I can refer to them.

Trial Examiner Bokat: You certainly can.

(Whereupon witness steps down and returns to the witness stand with a notebook.)

The Witness: My records show we met with the company on October 22nd, and from that time on,—I called up Mr. Barth to find out whether we could have another meeting; and then I didn't hear from them until November 12th at 5 o'clock. Mr. Powell called me up.

Trial Examiner Bokat: Now, let's see if I can get this straight. [235]

Mr. Ball: Let the record show that Mr. Dixon took something like four and a half minutes by the clock, looking over a short calendar which contains about five days' records on a page.

Trial Examiner Bokat: I don't know what the pages contain. He has, certainly, a memorandum pad in front of him, which he has been consulting for approximately five minutes. The record will show that, of course.

(Testimony of Fred Dixon.)

Now, let's see if I can clarify this in my own mind. You testified that after the October 22nd meeting,—just a few days thereafter,—you had a telephone conversation with Mr. Powell. Mr. Powell was taking a trip, and his cab was waiting for him outside. He said he would call you from the airport, which he did. Can you, by looking at your notes, refresh your recollection as to when that conversation took place?

The Witness: That was after our 22nd meeting, in October.

Trial Examiner Bokar: Yes, I know. But how long after? If you have any note about that particular conversation,—

The Witness: That was on the day,—he left the following day.

Trial Examiner Bokar: It was the following day?

The Witness: Oh, yes. Either that day, or the following day,—I don't recall. It had to be the following day, because it was about 7 o'clock when the meeting broke up. It was in the afternoon when he called me up the next day. [236]

Mr. Ball: The fact is, it was the following day?

Trial Examiner Bokar: All right. You say, then you had several telephone conversations with Mr. Barth, in which you requested another meeting. Is your answer still the same after looking at your notes? That you had several conversations, or had only one?

The Witness: No, I had several.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: You mentioned only one specifically after looking at your notes.

The Witness: I would call Barth, and Barth would not probably be in, and he would return my call, and finally we would get together. We don't keep track of all our telephone calls. We do keep track of our meetings. I recall at least half a dozen telephone conversations between that last meeting and November 12th, when Mr. Powell called me up, talking with Mr. Barth, trying to find out what was going to be the answer of the company; if they were going to give us a counter proposal or not.

Trial Examiner Bokat: What did Mr. Barth say in that telephone conversation?

The Witness: He said he was without authority to do anything; that it was in the hands of Mr. Powell; and that he was trying to get Mr. Powell in here.

Trial Examiner Bokat: You say then on November 12th Mr. Powell finally called you? [237]

The Witness: He called me at 5 o'clock.

Trial Examiner Bokat: What happened when he called you? What was said by you and what was said by him?

The Witness: He called me and said he had just come to town and he would like to have a meeting with us; he had just met with Mr. Estabrook,—he was through meeting with Mr. Estabrook and he wanted to meet with me. I told him, I said it was impossible for me to meet with him right at that

(Testimony of Fred Dixon.)

time. I said, "If I had known you was coming into town, I probably could have arranged for it." I said I was leaving for San Francisco that evening,—at 10 o'clock I was leaving Portland for San Francisco to attend a meeting at our West Coast conference. I said I could not meet with him then, but I would be glad to meet with him any day. Mr. Powell said, "Well, I will be in San Francisco by Saturday"; he says, "Will you stay over in San Francisco and meet with me?" I said, "Yes, I will stay over." And so the conversation ended there. Powell was to look me up when he got to San Francisco. I told him the hotel where I was stopping at. Well, I was there in San Francisco, and the conference went on. We got a communication,—word came in there from Ted White asking me to stay over until,—it was either Tuesday or Wednesday of the next week. They was having a meeting with Mr. Powell,—Mr. Powell was coming into town,—and the representatives of the Pacific Coast of the Clerks and the Warehousemen's unions was going to [238] meet with Mr. Powell, and for me to stay over after the conference,—which is a matter of record,—asked me to stay over and attend this meeting, which I agree to; and the meeting did not materialize. Tuesday came along and we couldn't find Mr. Powell. So, I had to leave San Francisco, because we had no answer whether Powell would be there then or thirty days from that date. So, I had to get back home; get back home here for Thanksgiving.

(Testimony of Fred Dixon.)

Q. (Mr. Walker continuing) Your telephone conversation was with Mr. Powell on the 12th?

A. The 12th, yes.

Q. You say that you were advised by Mr. White that Mr. Powell would meet with you next Tuesday or Wednesday?

A. He informed the conference,—the Clerks' representative from Portland, the Clerks' representative from Oakland, and the Warehousemen's,—to stay over and attend this meeting, which we agreed to do. Mr. Powell would be there to meet with all the representatives.

Q. Which was the Tuesday or Wednesday following the telephone conversation on the 12th, is that correct?

A. Yes. It was in that neighborhood; because we met that week, and it was the following week.

Mr. Ball: I move to strike out all of this testimony as to what conversation may have taken place between Mr. Dixon and Mr. White, which was not necessarily, or shown to be, known to [239] the respondent. And further, as not bearing upon any of the issues in this case. Incompetent and irrelevant.

Trial Examiner Bokar: I don't think it is particularly material. I am merely letting it stand as the course of conduct of the witness. It shows the witness' course of conduct, over a week or two after speaking to Mr. Powell. It is not necessarily binding upon respondent.

Q. (Mr. Walker continuing) In the month of

(Testimony of Fred Dixon.)

December, 1940, did you have any telephone conversation with Mr. Barth? A. Yes.

Q. Have you any notations of telephone calls in December? Or at any time subsequent to your return to Portland from San Francisco?

A. When I returned from,—

Mr. Ball: (Interrupting) Let the record show the witness has been refreshing his recollection by looking at some memorandum.

Trial Examiner Bokat: Yes.

The Witness: When I returned from San Francisco, why, the only contact that I had was by telephone with Mr. Barth just previous to our strike. I informed Mr. Barth that we were very anxious to try to bring about a settlement; that our people were getting very anxious; that they thought we were stalling for time, or that the company was stalling for time; and that I either had to do something about it, or forget all [240] about it until the following night. Mr. Barth asked me if I felt that there was something he could do. I said, "Yes, you could throw the officials in here to meet with us." I said, "We are willing to withhold any action on the company as long as the company are agreeable to having a meeting.

Trial Examiner Bokat: When was this telephone conversation with Mr. Barth?

The Witness: It was on Monday, the 2nd; December 2nd.

Trial Examiner Bokat: Did you tell Mr. Barth,

(Testimony of Fred Dixon.)

at that time, that your union was going to take some action of some kind?

The Witness: No, I didn't state in so many words. I said no doubt we was calling a meeting; I said no doubt strike action would be taken. He said, "Well, we would like to avoid a strike because of the unpleasantness of a strike and all those things coming about. I said, "Far be it from me to want to call a strike, if there is any possible way our union and the company could get together."

Trial Examiner Bokar: What did Mr. Barth say?

The Witness: Mr. Barth agreed to try to talk to these officials and see if they could get in here and get things going. Evidently Mr. Barth was unable to get the officials to come in here, because no date was set until the time we called the strike.

Q. (Mr. Walker continuing) Did he say who he intended to contact? [241]

A. Mr. Powell.

Q. Was there anything further said in any of these telephone conversations?

A. I had a committee of employees of Montgomery Ward in my office prior to the strike,—three days prior to the strike, in my office,—when I was talking to Mr. Barth at his own home. I talked to him at least half an hour at his own home, telling him about the condition, that it was reaching a point where no doubt there would be a strike on the company,—at that time Oakland had already gone out on strike,—and that there was a possible

(Testimony of Fred Dixon.)

chance that there might be some strike here unless the company was willing to come down and meet with us.

Trial Examiner Bokar: You mean that the Oakland employees of the Montgomery Ward Company had gone out on strike?

The Witness: Yes, they had already gone out on strike at the time I had this telephone conversation.

Trial Examiner Bokar: What did Mr. Barth say?

The Witness: Mr. Barth said he would try to do everything he possibly could to see if he could get somebody in here. I told him that we would withhold action until Friday or Saturday, which we did. We withheld action until it finally got to the point where the committee asked to call a meeting for that Friday night. That Friday night we had this meeting and we explained, from the committee's angle, what meetings we had [242] had,—went right through the whole set-up from the time we started to organize, dealing with the company, what had transpired; and we left it up to the people to decide what they wanted to do; and a vote was taken and there wasn't a vote against,—not going out on strike. They all voted to go out on strike the following morning, which was Saturday, December 7.

Q. Were any reasons advanced for the taking of the strike action?

Mr. Ball: I object to this as not tending to prove or disprove any of the issues in this case. Not the best evidence.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: Overruled. I believe he has gone into it. But if you feel something has been omitted that you want to bring out,—I will let the question stand for that purpose.

A. Well, the employees felt that the company was getting a double payroll up; that there was in every one of their departments,—

Mr. Ball: (Interrupting) Just a minute. What do you mean by “the employees felt”?

The Witness: The employees had a feeling that the company was bringing in people to take their place in case a strike was called.

Q. (Mr. Walker continuing) How do you know the employees felt that way?

A. Because I had at least twenty-five telephone calls in one [243] day from employees from the store.

Trial Examiner Bokat: Now, I am going to sustain an objection of my own motion. That is not responsive. The question, I believe, was directed to the meeting that took place; not the telephone calls that were made during the day.

Q. (Mr. Walker continuing) What reasons, if any, in addition to those you have already mentioned, were advanced at the meeting which brought about the strike action?

A. Refusal of the company to get together with us to negotiate a contract.

Mr. Ball: I object to the question, and I ask my objection go in before the answer, on the ground

(Testimony of Fred Dixon.)

that it calls for the opinion and conclusion of the witness as to the reasons for the action. It is not calling for competent evidence. I move to strike out the answer for the same reason.

Trial Examiner Bokat: I will overrule the objection and deny the motion.

Mr. Ball: May I amplify my motion to strike on the ground that no proper foundation is laid for the form of the answer, the form of the statement of the witness.

Trial Examiner Bokat: May I clarify my ruling, Mr. Ball? I am attempting to ascertain what happened at the meeting,—if a strike vote was taken, and why it was taken. Now, from that, of course, it doesn't mean to follow that because the union's representatives, or bargaining committee, or whatever [244] it was, explained the course of negotiations to the employees present, and that, as a result of that report, they decided to take certain action, that is not proof of the fact, as I see it, that the company refused to bargain collectively. I merely want the record to be clear, that I am admitting that testimony merely to show a course of action, as to what happened. By letting that testimony stand, I am not finding, in effect, that the conclusions reached by the employees present at this meeting, as to whether or not the company refused to bargain collectively, are necessarily binding on the company. That is my position. I am merely letting it stand as a course of conduct; that, in fact, the

(Testimony of Fred Dixon.)

employees voted to go on strike because of certain reasons. Whether the reasons were true or not legally, as far as I am concerned, is something entirely different. With that qualification, I will overrule the objection.

Mr. Ball: I wish to amplify my objection on the ground that the answer, as such, is not competent to prove or disprove any of the issues in this case. Even the facts stated by the Examiner.

Trial Examiner Bokat: Overruled.

Q. (Mr. Walker continuing) Then did you have any meetings with any of the representatives of the company, or other contacts, between the time of the strike and December 13th? A. No, we didn't.

[245]

Q. Now, did you have a form of the agreement, Board's Exhibit 7, before the parties who attended the meeting of December 13?

A. The company had; but at that meeting there, why, there was no contract presented at that time. The meeting was called by the Federal conciliator to try to get the parties together.

Trial Examiner Bokat: May I interrupt for a moment. When did the strike vote meeting take place? The day before the strike?

The Witness: Yes.

Trial Examiner Bokat: December 6th?

The Witness: Yes, December 6th.

Trial Examiner Bokat: All right. Proceed.

(Testimony of Fred Dixon.)

Q. (Mr. Walker continuing) Then at the meeting of December 13th, a form of the agreement was not before the parties at the conference and during the course of the conference?

A. I wouldn't say it wasn't before them. I wouldn't say that it wasn't, because Mr. Huddleston had copies of the agreement. But we didn't present any.

Q. I see. Now, what occurred at the meeting of the 13th?

A. It was a general discussion, trying to find ways and means to get the two parties together and to bring about a settlement of the strike.

Q. Well, how did it open up?

A. Well, the Federal conciliator, he opened up the meeting.

Trial Examiner Bokar: Is this the same Ashe we had before? [246]

Mr. Ball: This is the same meeting of December 13th we had before.

Trial Examiner Bokar: Yes. I wanted to make that clear.

Q. (Mr. Walker continuing) At the meeting of December 13th, was there any discussion concerning the letter of October 2nd, marked Board's Exhibit 6?

A. I don't recall whether there was at that meeting or not, because those meetings were so close together,—three of them so close together,—I don't

(Testimony of Fred Dixon.)

recall whether it was at that first meeting or whether it wasn't.

Q. At either of the three meetings, was the Retail Clerks' representation discussed?

A. It was.

Q. What was said about it?

A. The point was brought out that the reason of our differences and our strike, how it came about—the conciliator asked various questions and the gentlemen present,—I don't recall just who they were,—and they brought out the point if there was any question about whether we represented the majority or not,—

Q. Who brought that out?

A. I believe Mr. Ashe brought out whether there was any question whether we represented the majority or not. Mr. Powell stated,—

Mr. Ball: Just a minute. You mean Mr. Ashe asked Mr. Powell just what you have related? [247]

The Witness: Yes.

Q. (Mr. Walker continuing) All right.

A. And, Mr. Powell stated that they were accepting the Clerks; that they were **bargaining with** and accepting the Clerks as having the majority; that they had agreed to that.

Q. Now, let's go back to the meeting of the 13th again. Was anything discussed at the meeting in addition to the discussion of the clauses in the Warehousemen's agreement?

(Testimony of Fred Dixon.)

A. If my memory serves me right, why, at that meeting Mr. Ashe wanted the company and the unions to consent to hold negotiations jointly with all the three parties; and that they all get contracts, and set this date,—start out setting a date for going into the contracts.

Trial Examiner Bokat: What three parties are you referring to?

The Witness: Office Workers, Clerks, and Warehousemen.

Trial Examiner Bokat: All right.

Mr. Ball: Will you read that answer to me?

(Whereupon the last answer was read aloud by the reporter as above indicated.)

Q. (Mr. Walker continuing) Did Mr. Powell or Mr. Barth or Mr. Huddleston say anything about that suggestion?

A. I think Mr. Powell agreed to that suggestion.

Q. Do you know a Mr. Glazier?

A. Yes. [248]

Q. How did the meeting of the 13th end?

A. Well, we was just wrangling around on the same basis,—

Q. What had you been wrangling about?

A. Well, the company couldn't agree to this and the company couldn't agree to that,—various sections in there in the contract, they had gone all around about it,—when they come to this meeting,

(Testimony of Fred Dixon.)

why, here they started all over again. What is the use of discussing this? We are still talking in the same place where we started from. We are not getting any place with this thing.

Mr. Ball: I move to strike out the answer of the witness, being entirely the substitution of his opinion and conclusion rather than a statement of fact. It is getting us nowhere listening to this kind of testimony.

Trial Examiner Bokar: The last part of the answer,—as to what Mr. Glazier said,—I am going to let that part remain. The testimony given prior to what Mr. Glazier said will be stricken as being a conclusion of the witness.

Q. (Mr. Walker continuing) What had occurred at the meeting before Mr. Glazier made that statement?

A. I couldn't recall all the details, because—

Q. What had gone on? What had been discussed, if anything?

A. Well, the reason of the strike.

Q. With what organization is Mr. Glazier connected?

A. He represents the Warehousemen in Seattle.
[249]

Q. Was anything concerning the Warehousemen discussed at the meeting of the 13th?

A. Yes, Mr. Glazier brought out how they dealt with Sears Roebuck & Company in Seattle.

Q. How who dealt with Sears Roebuck?

(Testimony of Fred Dixon.)

A. The Warehousemen's Union in Seattle.

Q. Was there anything else concerning the Warehousemen discussed at that meeting by any of the Warehousemen's representatives?

Mr. Ball: I object to the question. I think it is about five times in the course of the last ten minutes that question, almost identically worded, has been asked of this witness. It is getting repetitious.

Trial Examiner Bokar: Read the question, Mr. Reporter.

(Thereupon the last question was read aloud by the reporter as above recorded.)

Mr. Ball: He is attempting to lead the witness into something apparently the witness does not recall.

Trial Examiner Bokar: Overruled. I will let it stand. You can answer the question.

The Witness: Well, so many things, some of them of minor importance,—I don't recall of any major importance.

Trial Examiner Bokar: All right.

Q. (Mr. Walker continuing) Was a form of Board's Exhibit 3 before the parties at that meeting (handing exhibit to witness)? [250]

A. Yes.

Q. Was there anything about it said at that meeting?

A. Yes. Estabrook brought out the point that it had fifteen sections and it had fifteen crosses,—that they had gone into negotiations with the com-

(Testimony of Fred Dixon.)

pany and when they got through they had fifteen crosses or rejections.

Trial Examiner Bokat: You heard him say that?

The Witness: Yes.

Trial Examiner Bokat: Who did he say it to?

The Witness: It was told in the presence of this meeting.

Mr. Ball: I move to strike out the answer of this witness as to what Mr. Estabrook said. The Board has had the opportunity to put in, by Mr. Estabrook himself, testimony as to what he said at this meeting. It is an attempt to expand and enlarge upon that testimony when Mr. Estabrook couldn't remember or recall. It is entirely improper.

Mr. Landye: In this type of a case, where we are going back several months trying to get conversation continuing over several hours,—I am quite sure if we had refreshed Mr. Estabrook's memory on that point we would have been accused by counsel of coaching the witness.

Mr. Ball: I don't see that there is much difference in coaching Estabrook and coaching Dixon on the same matter to fill in what you didn't get.

Mr. Landye: I resent counsel's insinuations,——
[251]

Trial Examiner Bokat: Just a minute, gentlemen, please. I don't want counsel to be addressing each other like this. Address your remarks to me. Let's have no general argument about objections, or the

(Testimony of Fred Dixon.)

merit of the objections. I will give each party their say, and then I will make my ruling.

Objection overruled.

Q. (Mr. Walker continuing) Following the,—

Mr. Ball: (Interrupting) We further move, then, to strike the answer on the ground of hearsay and incompetent; doesn't tend to prove or disprove any of the issues in this case; and furthermore, it is a denial of due process of law to the respondent and in violation of the rules of ordinary procedure.

Trial Examiner Bokat: Motion denied. I am sorry, Mr. Ball, but this witness was present. He testified under oath he was there and heard this statement made in the presence of all these people. I don't want to argue the objection with you. There is some merit to your argument. But we have gone all over this. Perhaps it is somewhat redundant, but I will permit it to stand. Let's proceed, please.

Q. (Mr. Walker continuing) Following that statement of Mr. Estabrook, what next was said or done at the meeting?

A. Well, I don't recall whether there was very much said or done after that meeting. Arrangements was made to have another meeting.

Trial Examiner Bokat: May I interrupt? I would like to ask [252] the witness, in regard to Board's Exhibit 7 for Identification, whether the clauses of that contract were discussed article by article or section by section. Can you answer that question?

(Testimony of Fred Dixon.)

Heretofore you testified that the only section that was ever discussed with the respondent prior to this meeting was Section 1. What I want to know is, did you have a meeting after that in which you discussed more than Section 1?

The Witness: You have referred to before the strike? If there was any section discussed outside of Section 1 before the strike?

Trial Examiner Bokat: Let's say, before the strike, first.

The Witness: No.

Trial Examiner Bokat: After the strike, your next meeting was December 13th. On this particular meeting, were any sections, outside of Section 1, discussed with the company?

The Witness: No, our contract was not discussed on the meeting of the 13th.

Trial Examiner Bokat: It was not?

The Witness: No.

Trial Examiner Bokat: All right.

Q. (Mr. Walker continuing) Was Mr. Landye at the meeting of the 13th? A. Yes.

Q. Did any of the parties at the meeting of the 13th request anything of the company representatives? [253] A. Yes.

Q. What?

A. Mr. Landye requested from the company that they give us a counter proposal.

Mr. Ball: I object to this being not literally a quotation of what was said, and necessarily involving

(Testimony of Fred Dixon.)

the opinion and conclusion of the witness concerning one of the ultimate legal questions.

Trial Examiner Bokat: I will ask the witness if he knows what was said by Mr. Landye, to the best of his recollection.

In effect, I am sustaining your objection and letting the next question stand.

The Witness: Mr. Landye asked Mr. Powell if the company was in a position to give us a counter proposal.

Trial Examiner Bokat: Did he use the words "counter proposal"?

The Witness: Yes.

Trial Examiner Bokat: All right.

Mr. Ball: The same objection, and a motion to strike for the same reason.

Trial Examiner Bokat: Objection overruled and motion denied.

Q. (Mr. Walker continuing) Did Mr. Powell answer?

A. Mr. Powell answered in the same way he had answered previous, that the company wasn't asking anything of the union [254] and he seen no reason why they should give a counter proposal.

Q. Did you attend the meeting of the 14th?

A. Yes.

Q. Was Board's Exhibit 7,—the agreement of the Retail Clerks,—discussed at that meeting?

A. Was there a meeting after that 14th?

Q. No, at the 14th meeting.

(Testimony of Fred Dixon.)

A. What I mean,—

Q. Yes, there was.

Trial Examiner Bokat: It has been agreed there was meetings on the 13th, 14th, and 16th of December. He is now asked about the December 14th meeting.

The Witness: The December 14th meeting. I don't recall very much of the December 14th meeting. I didn't participate very much in it, only as a standby while the rest of them done all the discussion.

Q. Was the proposed agreement of the Retail Clerks discussed at all at that meeting?

A. I don't recall whether it was the 14th or the last one,—I know it was one of those two meetings where the agreement was discussed. I don't recall which it was.

Q. In what manner was the agreement discussed at either the meeting of the 14th or 16th?

A. We gave copies to all the representatives of the company, as well as representatives of the different unions. We all [255] had copies in front of us. And we started out discussing the contract; and we checked off any part of the contract that was agreeable, and checked off the sections of the contract we disagreed upon.

Q. Did you discuss Section 1? A. Yes.

Q. What was said about it?

A. Put a check on it,—rejected.

Q. Now, what had been said about Section 1 before you put the check on it?

(Testimony of Fred Dixon.)

A. Well, the same objection that they had made before.

Q. Well, tell what it was.

A. That it was against the company's policies and principles to compel people to belong to the union, if they seen fit not to belong to the union.

Q. Did somebody say that?

A. Mr. Powell did.

Q. Did the union say anything to that?

A. No; just checked her off as an objection.

Q. And then what did you do?

A. Well, we went on through the contract. I don't recall,—I don't happen to have a copy of the one that had the rejections in it,—but there was a few sections in there of minor importance, that they already had in effect, that they accepted. Well, when we did come to the salaries,— [256]

Mr. Ball: Just a minute. I move to strike that portion of the witness' testimony, that some sections or articles are of minor importance.

Trial Examiner Bokat: Yes, I will have to sustain the motion.

Q. (Mr. Walker continuing) After you had finished with Section 1, what part of the contract did you take up next?

A. We took up Section 2.

Q. Was there any discussion on Section 2?

A. Yes, there was a little discussion.

Q. What was said about Section 2?

(Testimony of Fred Dixon.)

A. Not very much on Section 2.

Q. Well, what?

A. I don't recall exactly what took place.

Trial Examiner Bokat: Did the company agree to accept it as written, or did it not?

The Witness: No, it rejected it, to my knowledge. I haven't—

Mr. Ball: I move to strike out this word "reject." Apparently, from the way this witness is now using the word, it expresses an opinion and a conclusion, and does not describe the facts. I also move to strike out that testimony where this same witness has used that same word as a result of action before, because it now becomes apparent he used it in all occasions expressed an opinion and a conclusion.

[257]

Trial Examiner Bokat: As to the last answer, I am going to allow the motion.

Mr. Ball: Is there a ruling on the motion?

Trial Examiner Bokat: As to the last answer.

Mr. Ball: You will reject it?

Trial Examiner Bokat: I am granting the motion.

Mr. Ball: Thank you.

Q. (Mr. Walker continuing) What did the representatives of the company say about Section 2?

A. That is difficult for me to remember that far back.

Q. Well, read it over.

A. Well, I doubt if there was very much discussion outside of that we just practically went

(Testimony of Fred Dixon.)

right through until we got to the salaries. In fact, we asked the company that if the same procedure was to follow in our sections as in the Warehousemen's, that if there were objections on the part of the company,—the objections to the articles that were in the Warehousemen's agreement, if they would apply as far as the Clerks' agreement, and they said yes. So we skipped them and come to the salaries.

Q. All right. And was that done?

A. Yes.

Trial Examiner Bokat: I will declare a ten minute recess at this time.

(Thereupon a short recess was taken in the hearing, after which the following proceedings were had:) [258]

Trial Commissioner Bokat: You may proceed when you are ready, Mr. Walker.

Q. (Mr. Walker, continuing) You have mentioned a discussion turning largely on wages. Are you referring to Section 31 of the agreement?

A. Yes.

Q. What was said about Section 31?

A. Coming to Section 31, why, they said that the company was not granting any wage increases, and that the company felt that they were the ones to decide whether the employees should have more money.

Mr. Ball: Now, at this time, I would like to

(Testimony of Fred Dixon.)

ask, Is it the meeting of December 14th we are dealing with now?

Trial Examiner Bokat: The witness states either the 14th or the 16th; he cannot recall at which one of those two meetings it happened. Is that correct?

The Witness: That is correct.

Q. (Mr. Walker continuing) What did the union say to that, if anything?

A. We asked them if that was their answer, that there would be no wage increases; they said, Yes. So we just passed on.

Q. Did either Mr. Barth or Mr. Powell say anything further about wages at that time?

A. I don't recall Mr. Barth saying anything on it at all. Mr. Powell stated that there was no wage increases, and that was [259] the end of it. I don't recall Barth saying anything on it.

Q. Did he give any explanation for his statement?

A. He give the explanation that they felt they was paying wages comparable to what was being paid in the city of Portland.

Q. Did he give any reason for his statement, other than that?

A. No; not to my knowledge.

Q. Now, in what manner did the meeting of the 16th end?

A. As I say, those two meetings took place,—they were so close together and I had so many

(Testimony of Fred Dixon.)

things coming up,—I don't recall which one it was, or, rather, what took place at each meeting.

Q. At either of the meetings, did Mr. Ashe take any part? A. Yes.

Q. Can you relate what Mr. Ashe said?

A. Well, I recall in the last meeting, Mr. Ashe asked the company if, at that time, would they grant any wage increase, and they said, No; he said would they enter into any kind of an agreement covering any kind of a union shop clause, and they said, No; he wanted to know if they would enter into anything concerning seniority, and they said, No. I don't recall whether it was right after that or not, but he stated he had reporters that he wanted to make statements to, and he wanted to make a report to Washington, D. C., and he wanted to make a report of the reason of the strike. He wanted to clarify [260] these points,—the advertisements appearing in the newspapers explaining why the strike was called,—he wanted to find out whether there was more to it than just what the advertisements said. I do recall Mr. Ashe,—I think it was the last day, the last meeting that we had, that he was present,—I do recall him picking up his papers and saying, "We aren't getting any place; we might as well call it quits." And he put his stuff in his brief case and we broke up the meeting.

Q. At any of the meetings was there a stenographer present?

(Testimony of Fred Dixon.)

A. No. Mr. Ashe requested,—asked for permission,—I don't recall which meeting it was,—he asked for permission to have a stenographer there, to have a girl to take down the activities; because he accused the company, as well as the union, of being vague in their statements as to dates or times. Mr. Ashe asked for permission to have a stenographer there to take things down in shorthand so they could have some minutes of the meeting.

Q. Who did he ask this permission of?

A. He asked Mr. Powell.

Q. Did Mr. Powell say anything?

A. Mr. Powell said that he would take it under advisement and they would let Mr. Ashe know.

Q. Did he?

A. He told him, No, he could not have a stenographer.

Q. Any reason? [261]

A. No. They felt,—they gave the reason that the discussion would not be flexible enough if they had a stenographer there.

Q. When you say "they" who do you mean? You state "they felt." Who is "they"?

A. The representatives of Montgomery Ward & Company.

Q. During the course of that discussion relative to having stenographic notes taken, did you make any observation about the absence of taking notes?

A. Yes.

Q. What?

(Testimony of Fred Dixon.)

A. I brought it to attention that I seen Mr. Huddleston writing down things on the desk. We felt that we should have a report of this meeting so we would know exactly what took place.

Q. Was anything said to that?

A. Oh, I don't recall; there was something; I don't recall just what exactly was said.

Q. Was there anything said about dictagraphs, or dictaphones?

Mr. Ball: Not only is this getting rather leading, but I can't see it has any bearing at all.

Trial Examiner Bokat: I can't see it has any proper bearing, unless you want to connect it up with someone. As I see it, there is nothing to prevent any representative of the union from making notes. Was there anything to prevent you from making notes if you wanted to, Mr. Dixon?

The Witness: No. [262]

Trial Examiner Bokat: Well, all right.

May I remind counsel for the Board that he has not yet offered Board's Exhibit 7 in evidence.

Mr. Walker: Thank you. It had slipped my mind.

It is hereby stipulated by and between the parties that what has been marked as Board's Exhibit 8 for Identification may be received in the record without further identification.

Mr. Ball: For what it shows on its face.

Mr. Walker: That is all.

(Testimony of Fred Dixon.)

Trial Examiner Bokar: It will be received and marked in evidence as Board's Exhibit 8.

(Thereupon document heretofore marked as Board's Exhibit 8 for Identification was received in evidence.)

BOARD'S EXHIBIT No. 8

All blank spaces on this Application must be filled in completely

Retail Clerks International Protective Association
Affiliated with the American Federation of Labor

APPLICATION FOR MEMBERSHIP OR REINSTATEMENT

Local No. Exact Date of Initiation
.....19.....

City..... State.....

Name of Applicant..... Age.....

Residence Address

Business Address

*Are you actively employed in or by a retail establishment?

Give name of firm.....

State character of work performed.....

How many years have you been so employed?.....

Where.....

How is your general health at the present time?
.....

Have you ever been a member of the International Association before?.....

Where?.....

(Testimony of Fred Dixon.)

When did your affiliation cease and why?.....

Do you agree at all times to abide by the laws of
this Association?

What was the exact date of your birth?.....

I hereby affirm that the above statements made by
me are true and correct, and agree that all moneys
paid by me shall be forfeited to the International
Association, and that my membership shall be de-
clared void if they are not true.

I hereby Designate M.....
as my Beneficiary to receive such Funeral Benefits
as may be payable at my death, according to the
Constitution.

.....
(Signature of Applicant)

.....
(Date of Signing)

We, the Local Executive Board, report.....
on the above application.

(Signed).....
.....
.....

(Extracts from the Constitution)

*Section 7. (a) All persons, over the age of six-
teen years, regardless of sex, employed in stores,
mercantile and mail order establishments, who are
actively engaged in handling or selling merchandise,
and who are under no restrictions specified in these

(Testimony of Fred Dixon.)

laws are eligible to membership, and classified as beneficiary, non-beneficiary, non-active, and general members. Note Sec. 7(d), (e), (f), (g).

Section 32. (a) All applications for membership and reinstatement in this Association shall be made on blanks furnished by the International. Such applications shall be furnished to the Local Unions in duplicate, one copy to be forwarded to the International Secretary-Treasurer for acceptance and one copy to be retained on file by the Local Union.

(c) All applications for membership shall be referred to the local executive board, who shall report their findings to the Local Union, and if adversely, give their reasons therefor if demanded by any member.

The applicant shall name on the application for membership the individual to whom Funeral Benefits shall be paid in case of death.

\$1.00 of the initiation fee or reinstatement fee must be forwarded to the International Association with this application, together with per capita tax for month in which initiation occurred.

[Attached to Application]

Name

Experience.....yrs.mos.

Present Hoursper (day—week)

Present Wages \$.....per (1½ month—week)

(Testimony of Fred Dixon.)

Initiation Fee to be paid as follows:

.....
.....
.....
.....
(Applicant's Signature)
.....

Mr. Walker: I now offer what has been marked as Board's Exhibit 7 for Identification in evidence.

Trial Examiner Bokat: Any objection to 7?

Mr. Ball: None whatever.

Trial Examiner Bokat: Mark it in evidence as Board's Exhibit No. 7.

(Thereupon document heretofore marked as Board's Exhibit 7 for Identification was received in evidence.)

BOARD'S EXHIBIT No. 7

DEPARTMENT STORE

WAGE SCALE AND AGREEMENT

of

RETAIL CLERKS UNION, Local 1257

Retail Clerks International Protective Assn.

Between, of Portland, Oregon and Local No. 1257, Retail Clerks International Protective Association, of Portland, Oregon and affiliated with the American Federation of Labor.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

This Agreement, mutually made and entered into this day of, 1940, by and between of Portland, Oregon, Party of the First Part, and the Retail Clerks International Protective Assn., Local No. 1257, of Portland, Oregon, Party of the Second Part, to-wit:

Section 1. Employers shall be entitled to employ or hire any employees, provided, however, that such employee shall make application within two (2) weeks after being employed to become a member of the Union and if satisfactory to the employer and found worthy by the Union he will be admitted to full membership in the Union.

(a) A temporary working permit good for thirty (30) days only shall be secured by all new or extra salespeople, not members of the Union at the time of employment, provided they are employed more than one (1) day. No working permits shall be issued until all available regular employees of the company are restored to full time service if competent, and available. All new steady employees working half time or in excess, shall be issued a permit for thirty (30) days only, at the expiration of which time they shall affiliate with the Union, provided, they are still employed half time or in excess. Regular extra employees who are employed less than half time shall secure a working permit from the Union the first of every month.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

Section 2. All persons employed by the Party of the First Part who are actively engaged in selling shall be members of the Retail Clerks Union, Local No. 1257, and all other employees as designated by ensuing classifications shall be members of Local 1257. Window trimmers and assistants; mail order department employees; floor cashiers; outside salesmen; marking room employees; bundle wrappers; and all other employees not coming under the jurisdiction of any other Union, except executives. The exception of the executives are to be agreed upon between the Business Representative of the Union and the Representative of the Employer.

Section 3. No male employee shall be discharged and replaced by a female employee unless the female employee shall receive the minimum wage for men as classified. This shall not apply when a male employee leaves the company of his own accord or is dismissed for good and sufficient reason.

Section 4. No regular full time and no regular part time employee shall suffer any reduction of pay or be required to make up any time for holidays, the following holidays to be observed: New Year's Day, Memorial Day, Fourth of July, Armistice Day, Labor Day, Thanksgiving Day, Christmas Day; and all other holidays nationally or locally observed by the stores parties to this agreement. When a holiday falls on Sunday the following Monday shall be observed.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

Section 5. In the laying off of help due to slackness of business and in the consequent re-employment, seniority rights shall be observed.

Section 6. A mutually agreeable system shall be worked out between the employers, parties to this agreement, and the Union to permit the Union activities of receiving complaints and collecting dues during store hours, provided that such activities shall be conducted at reasonable times and so as not to interfere unreasonably with the conduct of the employers' business or to interrupt or interfere with the performance of work.

Section 7. There shall be no discrimination by the Employer against any employee or applicant on account of membership in or on behalf of the Union.

Section 8. Duly authorized representatives of the Union, not on the payroll of the employer, shall be permitted to visit the stores, for the purpose of observing conditions under which members of the Union are working, and to see that the agreement is observed; provided that such visits shall be arranged with the employer. The Employer agrees to cooperate in arranging for such visits at reasonable times and to name two (2) or more persons in each store, each of whom shall have authority to make arrangements for such visits.

Section 9. The Employer shall provide in each store a bulletin board or boards, conveniently

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

located, for the posting of notices of official business of the Union. The Union agrees that it will not distribute handbills, posters or other literature within the store. The Employer will provide a receptable or receptacles, at or near such bulletin board in which the Union may place such notices of official business from 2 o'clock on.

Section 10. For the purposes of this agreement, employees are designated as follows: (a) Regular full-time employees; (b) Regular short-hour employees; (c) Extra employees. These are defined as follows:

(a) A regular full-time employee is one who has been employed to work a full number of hours each week. Any employee continuously employed on a full time basis by the Employer for at least six (6) months shall be considered a regular full-time employee.

(b) A regular short-hour employee is one who has been employed regularly less hours per week than a full working week. Any employee who has been continuously employed by the Employer on a short hour basis for at least six (6) months shall be considered a regular short-hour employee.

(c) An extra employee is one employed for temporary work.

(d) A break of service shall not prevent such service from being continuous under subdivisions (a) or (b) of this section, provided that six (6)

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

months of actual service shall have been rendered within a total period of two (2) years from commencement of employment.

Experience shall be based on the total experience accumulated in retail stores or departments of the same classifications.

(e) It is understood and agreed that all of those employees who were employed as regular full-time employees, or regular short-time employees, as of, and who at the time of signing of this agreement, will not have had six (6) months service shall automatically be rated as regular full-time employees, or regular short-hour employees as the case may be.

(f) The term "regular" used in this section refers to the status of an employee within the particular establishment in which he is working. To attain such regular status employee must have had six (6) months of continuous employment as defined above, with the same employer in Portland.

Section 11. (a) Each employee shall be provided with a card setting forth classification of employment, wage and daily schedule of hours of employment with the starting and finishing time for each day.

(b) Immediately after the signing of this agreement there shall be established a Classification Committee composed of three (3) representatives of the Employer and three (3) representatives of the

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

Union. It shall be the duty of this Committee to pass on all matters pertaining to adjustments of the classification of employment.

Section 12. (a) Forty-four hours completed within six days shall constitute a week's work. Employees shall be placed on a straight time schedule of hours, such schedule to be entered on employee's classification cards. Before any change is made in any such schedule one week's notice shall be given to the employees affected, except in cases of emergency or where the change is mutually agreed to by the Employer and the employees affected.

(b) Overtime shall be paid for at the rate of time and one half.

(c) All sales or transactions are to be completed if they are taking place at the normal quitting time of the employee without payment of overtime.

(d) Overtime shall be paid for all work prior to 9:15 A. M. or after 5:45 P. M. as the case may be, and except in the case of those employees whose work must be necessarily be performed in whole or in part before 9 A. M. or after 5:45 P. M. as the case may be.

(1) Mail openers and distributors, sales audit clerks, cash register readers, stock distributors;

(2) Extra wrappers, packers, parcel post and delivery employees who on Saturdays are required to report for duty after 1 P.M.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

- (3) Employees required for inventory work on one night in January and one night in July.

(c) Outside salesmen, collectors, appraisers and adjusters shall be exempt from all limitations of hours except when required to do inside work.

Section 13. No one shall be sent to lunch prior to eleven (11:00) A.M. Every employee shall be sent to lunch at least within five (5) hours of the time of their reporting to work. Any employee who works in excess of five (5) hours without a lunch period shall receive overtime for all such work performed in excess of five (5) hours. All sales or transactions shall be completed if they are taking place at the time the person is to go to lunch without the payment of overtime.

Section 14. When a company doctor pronounces an employee physically unfit to carry on their active duties as an employee, the employee shall have the right to demand an examination by an outside doctor supplied by the Union. If the two doctors are unable to agree on the diagnosis they shall call in a third doctor and the decision handed down by the third doctor shall be binding. The cost shall be borne equally by the employer and the Union.

Section 15. (a) All regular employees who have been in the service of the Employer continuously for one year shall be granted a minimum of

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

one week's vacation with pay. All regular employees who have been in the service of the Employer continuously for two years shall be granted a minimum of two week's vacation with pay. In cases where stores have vacation policies which are not in conflict with the foregoing said policies may be retained. Vacations shall be granted between April 1 and October 1 or at other times if mutually agreeable. This provision shall be effective after the current vacation schedule.

(b) In the case of regular short-hour employees pay for the vacation period shall be the average weekly pay received by such employee during the year preceding the vacation.

(c) Leaves of absence or any employee called for government service shall be granted at the discretion of the Employer, and when so granted employee shall be assured of his return to employment without loss of standing.

Section 16. Employers shall have the right to discharge any employee for unbecoming conduct, insubordination, incompetency, neglect of duty, failure to perform work as required not contrary to the terms of this agreement, or to observe safety rules and regulations, or the employers' store rules, which shall be conspicuously posted. If an employee feels he has been unjustly discharged, he shall have the right to appeal to the Adjustment Board.

Section 17. To insure that full and fair consid-

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

eration be given all employees in filling vacancies or new positions, in making transfers, promotions, or wage increases, the Employer agrees to review regularly the records of all employees.

Section 18. It is understood and agreed that quota systems shall not be used as the sole basis for discharges.

Section 19. Stock help shall be provided for the Women's Coat Departments, Yardage and blankets.

Section 20. (a) The Employer may require sales employees to do non-selling work providing that such assignments shall not be made during the peak hours and recognizing at all times the common interest of the Employer and of sales employees in the enjoyment by the latter of all reasonable and practicably opportunities of effecting sales. It is further agreed that such assignments shall be equitably distributed between the various members of the department.

(b) The Employer may make temporary assignments of non-selling employees to do selling work during peak hours or seasons only, but keeping in mind also the common interest of the Employer and of the selling employees in the enjoyment by the latter of all reasonable and practicable opportunities of effecting sales.

Section 21. If compulsory sales or educational meetings are held they shall be on the Employer's

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

time. Provided, however, that this does not apply to applicants who do not subsequently report for work.

Section 22. All contributions to charity shall be voluntary. It is understood and agreed that no compulsion shall be placed on the employee to force contributions.

Section 23. Not oftener than once a month sales employees, upon individual requests, shall be furnished with records of their sales, provided such sales are individually recorded.

Section 24. Department heads, buyers and assistant buyers, making sales shall enter the same on a department book, such sales to be divided equally among the employees in the department, provided, however, that where department heads, buyers and assistant buyers have their own books this principle shall not apply.

Section 25. An employee whose earning capacity is limited because of physical or mental handicap, or other infirmities, may be employed on suitable work at a wage agreeable to the Employer, the employee and the Union.

Section 26. (a) The Employer agrees to pay all fidelity bond premiums. All cash deposits or cash bonds in lieu of fidelity bonds now in force will be returned to the employees so affected at once. No employee shall be required to pay any premiums on public liability and property damage insurance re-

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

quired by the Employer, and covering the operation of an automobile while used in the Employer's business. Charges for physical examinations or sales training when required by the Employer shall be borne by the Employer.

(b) Any employee using his automobile for company service shall be compensated at the rate of five (5) cents per mile for all miles so used required by the Employer.

Section 27. The provisions of this agreement shall apply to all departments leased or subleased to others except where and so long as bona fide agreements or leases between the employers and lessees or sub-lessees in force at the date of this agreement do not permit such application. Subject to the exception stated in the preceding sentence of this paragraph, the provisions of this agreement shall also apply to employees acting as demonstrators or selling jointly for the Employer and others.

Section 28. Where the Employer requires employees to wear identical garb as to style or fashion, when such garb is not suitable for street wear, the Employer shall furnish the same. The Employer shall also provide for the maintenance of such garb.

Section 29. No more than one (1) apprentice shall be employed for each twenty (20) employees. These apprentices shall be reasonably divided among the different departments of the store, both selling and non-selling. It is agreed that an apprentice is

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

an employee having less than six (6) months experience in the retail trade, who receives less than the minimum wages specified herein for experienced employees and not less than the minimum scale for apprentices as herein provided for. Time served in one or more stores as an apprentice shall be cumulative.

Section 30. No salary rate herein provided shall be considered other than a minimum wage, and no salary rate above the minimum provided herein shall be reduced.

Before any Employer terminates Group Insurance in effect at the signing of this agreement, he shall give thirty (30) days notice of his intention to terminate to the employees affected.

Section 31. The following are agreed classifications, minimum weekly and monthly rates of pay thereof, and special working conditions as listed under the specified classifications noted:

1. (a) Men's Clothing

\$23.00.....	First year experience
25.00.....	Second year experience
32.00.....	Over three years experience

(b) Men's Furnishings

\$22.50.....	First six months experience
25.00.....	Second six months experience
27.50.....	Thereafter.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

2. Shoe Department

(a) Every regular male employee shall receive a minimum wage of \$27.50 per week, or \$119.50 per month. Extra male help shall receive a minimum wage of \$5.00 per day.

(b) Every part time employee shall receive a minimum wage of seventy-five cents (\$.75) per hour if employee works less than a full day. Any employee shall not work less than four hours in any one day.

(c) Every female employee shall receive a minimum wage of \$22.50 per week or \$97.50 per month.

(d) Every part time female employee shall receive a minimum wage based on the above minimum scale in proportion to the number of hours she works bears to the full day and shall not work less than four hours in any one day.

(e) Every apprentice shall receive a minimum wage as follows:

\$12.50 per week—	\$54.16 per mo.....	First six months
17.50 per week.....	75.83 per mo.....	Second six months
22.50 per week.....	97.50 per mo.....	Third six months
25.00 per week.....	108.33 per mo.....	Fourth six months

(f) All wages, salaries and commissions in force at the time of the making of this contract, greater than the minimum wages guaranteed under this contract, shall be continued in force, and any attempt on the part of the employer to diminish or cut down

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

such wages or either or both shall constitute a breach of this contract.

(g) Disregard the monthly pay clause if store is paying by the week.

(h) Any employee reporting for work at opening time shall receive a full day's pay.

3. Women's Ready to Wear and Corsets: Women employed in Ready to wear; suits, coats, silk dresses, corseteers, gloves, piece goods, blankets, draperies and hats shall receive the following scale:

\$16.00.....	First six months experience
18.00.....	Second six months experience
22.50.....	Third six months experience
25.00.....	Thereafter.

4. Miscellaneous Classifications: Service desk, candy, drugs, dry goods, wash dresses, lingerie, ladies underwear, infants wear, bargain room & markers:

\$16.00.....	First six months experience
18.00.....	Second six months experience
22.50.....	Thereafter

5. Hardware: Hardware, sporting goods and paints.

\$20.00.....	First six months experience
25.00.....	Second six months experience
27.50.....	Third six months experience
32.50.....	Thereafter.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

6. Jewelry: \$25.00 per week.

7. Household: Stoves, major appliances, radios, furniture and rugs. There shall be a minimum guarantee of \$35.00 per week for experienced men. The men to work on 10% percentage basis with stipulated guarantee.

8. Stockmen and Farm Basement. \$32.50 per week.

9. City Delivery:

Shipping Clerk\$32.50 per week

Dockmen 27.50 per week

Supervisor..... 35.00 per week

10. Service Station:

Collectors and adjustors.....\$27.50 per week

Service and repairs..... 27.50 per week

11. Window trimmers and display men:

Combination employees, including window trimmers or those working in more than one department shall receive one-half of the difference between the two scales applying over and above the lower scale. This provision does not apply to employees whose work in an additional department is incidental and occasional. \$35.00 per week.

12. Farm equipment and plumbing:

\$25.00 per week.....First six months experience

27.50 per week.....Second six months experience

32.50 per week.....Thereafter.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

13. Catalog Order Desk:

\$16.00 per week.....First six months experience
18.00 per week.....Second six months experience
22.00 per week.....Thereafter

14. Outside Salesmen: The outside salesmen shall be guaranteed a weekly drawing account of not less than \$25.00 and five cents (\$.05) mileage for all miles used for company service. Their hours will not be restricted.

15. Tires, Automobile parts and accessories:

\$25.00 per week.....First six months experience
27.50 per week.....Second six months experience
35.00 per week.....Thereafter.

Purchasing Agent—Any employee designated as a Purchasing Agent actively engaged in the Parts Department handling parts shall be paid not less than One hundred and Seventy-five dollars (\$175.00) per month.

Parts Manager—In charge of the Department and receiving in excess of one hundred and seventy-five dollars (\$175.00) shall not be subject to the terms of this agreement.

All parts departments and Accessories departments will close to the public between the hours of 5:45 PM and 9 AM.

Section 32. General Utility Employees: General Utility Employees shall be those employees not definitely regularly assigned to specific duties in any

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

selling or non-selling department. They may be used at the discretion of the employer in any department of the store for any duties, either selling or non-selling, as the occasion arises. Their number shall not exceed six (6) for the first one hundred (100) and five (5) for each one hundred (100) thereafter. The minimum pay for such employees shall be twenty-seven dollars and fifty cents (\$27.50).

Section 33. Extra Employees. All extra employees shall receive a differential of five cents (\$.05) per hour above the scale in the classification in which they work, with a guarantee of four (4) hours pay when ordered to report for work.

Section 34. Regular Short-hour Employees: Regular short-hour employees shall receive the rate of pay provided for the classification in which they are employed.

Section 35. Apprentices: The minimum weekly wage for apprentices shall be not less than Sixteen dollars (\$16.00).

Section 36. Assistant Buyers, Department Heads and Heads of Stock shall receive at least 10% increase in their guaranteed weekly rates above the maximum scale of their departments.

Section 37. All employees working split shifts shall receive one dollar (\$1.00) extra per day.

Section 38. (a) The monthly quota shall be for each month one-twelfth of the total yearly quota of

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

the year from, to Such monthly quota shall be maintained at the same figure for each month of the year. Deficiencies shall not be carried forward from one month to another. The present rate of commissions applicable to quotas shall not be reduced, nor shall any present rate of commissions be reduced. Commissions shall be paid monthly.

(b) Those employees below the minimums herein provided shall be increased to such minimums, but in no case shall employees receive less than a 10% increase in their guaranteed weekly salary or weekly drawing account, up to and including employees receiving \$34.99 per week as a weekly minimum guarantee or a weekly drawing account.

Section 39. Immediately upon the signing of this agreement there shall be established an Adjustment Board made up of three (3) representatives of the Employer and three (3) representatives of the Union. The Board shall meet within ten (10) days of the signing of this agreement and select by mutual agreement a panel of five (5) impartial persons, any one of whom may act as arbitrator at such time as the Adjustment Board is unable to agree upon any matter referred to it.

If the parties hereto are unable to agree within twenty (20) days after the signing of this agreement to the panel of five (5) impartial persons who may be requested to act as arbitrators,

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

shall each be requested to designate three (3) persons who in their opinion are qualified to act as impartial arbitrators. From the total list so made up each party may strike two (2) names and the remaining names shall constitute the panel from which an arbitrator shall be selected as provided herein.

No arbitrator shall be chosen to serve in two consecutive arbitrations unless by mutual consent of the parties.

The Adjustment Board shall consider all complaints and disputes arising under the terms of this agreement, all questions of interpretation of the agreement and discharge cases. All discharge cases must be appealed to the Board within four (4) days from the date of discharge, otherwise the right to appeal is lost. The Board of Adjustment shall have no authority to negotiate a new agreement.

Any matter referred to the Adjustment Board shall be taken up by the Board within forty-eight (48) hours. If the Board is unable to reach a settlement within five (5) days then the matter shall be submitted for disposition to one of the persons on the panel of impartial arbitrators selected by lot. Any decision made by a majority of the Adjustment Board or as a result of arbitration, shall be accepted as final and binding. Any expenses incurred as the result of arbitration shall be borne one-half by the Union and one-half by the Employer.

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

Section 40. In consideration of the Employer signing this agreement and fulfilling the conditions thereof, the Association agrees to notify its membership, the Central Labor Council of Portland, Oregon and the District Council of the State of Oregon that the Employer herein has signed this collective bargaining agreement with the Association. The Association further agrees to loan to the Employer, Union Store Card No. the property of an issued by the Retail Clerks International Protective Assn., affiliated with the American Federation of Labor, for the period this contract shall be full force and effect; provided, however, that the employer agrees to surrender said Union Store Card so loaned to him as aforesaid upon the expiration of this agreement, or upon demand made upon him by the Association, or upon violation of any provision or provisions of this agreement.

Section 41. This agreement shall be in full force and effect to and including the day of, 1940; and shall be renewed for the following year and from year to year thereafter unless either party shall give written notice to the other at least sixty (60) days prior to any..... day of....., during the life of this agreement of a desire to amend this agreement.

If, after giving such notice and prior to the..... day of.....next ensuing, the parties shall fail to agree to such amendments, this agreement

(Testimony of Fred Dixon.)

(Board's Exhibit No. 7 continued)

shall terminate at the expiration date; provided, however, that the parties may, by mutual written agreement, extend the agreement for a specified period beyond such expiration date for the continuance of negotiations; and provided, further, that after either party has given such sixty (60) days written notice of a desire to amend the agreement, either party may, not less than twenty (20) days prior to the expiration date, give to the other party written notice that it desires to terminate the agreement at the expiration date, in which event the agreement shall so terminate at such expiration date.

In Witness Whereof the parties have hereunto set their hands, duplicate, by their respective officers or representatives hereunto duly authorized at the City of Portland, State of Oregon.

For the Employer

For the Union

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Q. (Mr. Walker continuing) Are any departments, or phases of Montgomery Ward's operations in Portland, the employees of [263] which are eli-

(Testimony of Fred Dixon.)

gible for membership in the Retail Clerks, other than those engaged in the retail store?

The Witness: Yes; they have the employees of the catalogue order.

Q. (Mr. Walker continuing) Are there any employees in the general office department who are eligible for membership in the retail clerks? [264]

A. You mean according to the payroll, that are working in the payroll?

Q. No. According to the manner in which the employees are carried on the payroll.

A. Yes. On the payroll is the floor cashiers.

Q. Now, what are the duties of the floor cashiers?

A. The duties of the floor cashiers is to accept change and does the wrapping. There is a different practice in every store. In some stores,—

Q. What is the practice in Montgomery Ward's retail store?

A. Well, it is on the general run, making change and taking care of the store customers and delivering the final package.

Q. And where do their duties require them to be? Where do they do this work? [265]

A. They work right on all the floors where they are engaged in selling.

Trial Examiner Bokar: May I interject at this point? I may be running ahead of your planned questions, but the complaint alleges here that all the retail clerks of the respondent employed in its

(Testimony of Fred Dixon.)

Portland, Oregon plant, who are engaged in selling in the retail store, constitute a unit appropriate for the purposes of collective bargaining.

Trial Examiner Bokar: I want to find out whether the expression "retail clerks" includes people such as floor cashiers, package wrappers, window trimmers, and what have you.

Mr. Walker: That is correct. [266]

Q. Are there any other categories of workers who are eligible for membership in the Retail Clerks?

A. Yes. There is window trimmers helpers, and messengers.

Q. What do the window trimmers helpers do?

[267]

A. They help trim windows.

Q. How do they do that?

A. I don't intend to be a master of it. I merely state, as far as I know, as to what their duties are. To decorate windows; put merchandise in the windows for display purposes.

Trial Examiner Bokar: Are you referring now to window trimmers or to window trimmers assistants?

The Witness: Window trimmers assistants.

Trial Examiner Bokar: Any reference to window trimmers themselves?

The Witness: No.

Trial Examiner Bokar: Are window trimmers themselves eligible for membership?

(Testimony of Fred Dixon.)

The Witness: If they haven't got the right to hire and fire the employee working under them.

[268]

Trial Examiner Bokar: Before you make your objection, let me ask this question, and you can object to this question, too.

Coming to Montgomery Ward in particular, would you say that the window trimmer in that store was a man in a supervisory position and therefore you would only take in the assistants?

The Witness: The window trimmer, yes. A store of its size has more display than some of these smaller stores would have. Naturally he is exempt because he is supervising people.

Trial Examiner Bokar: You merely contend, then, for the window trimmers assistants, as far as Montgomery Ward & Company is concerned. Is that correct?

The Witness: Yes. [269]

Q. (Mr. Walker continuing) Now what do the messengers do?

The Witness: My interpretation is, a messenger is more or less of an errand boy.

Q. (Mr. Walker continuing) What do they do at Montgomery Ward?

A. They do just that thing.

Q. Where do they do their work?

A. In the retail store.

Q. Does their work bring them in contact with merchandise? A. Yes.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: What classes of employees has this witness already covered,—window trimmers assistants, messen- [270] gers, floor cashiers?

Mr. Walker: That is correct. [271]

Q. (Mr. Walker continuing) Do you know whether or not Montgomery Ward, at their retail store, employed individuals described as tire mounters? A. Yes.

Q. Are such eligible for membership in the Retail Clerks? A. Yes.

Q. (Mr. Walker continuing) What kind of work do the tire mounters do?

A. Well, the customer makes a purchase in the store, and they take the tires out to the station out there and mount the tires on the customer's car.

Q. And do they do any work in addition to that? Where do they do this work?

A. Do it alongside the retail store there.

Q. Do you know whether or not Montgomery Ward, at its retail store, employs a type of individual described as a service man?

A. Yes.

Q. Are such eligible for membership in the Retail Clerks? A. No. [272]

Q. Are employees who are described as tailor or tailors eligible for membership in the retail clerks?

A. No.

Q. With respect to the service man and the tailor, does the Retail Clerks claim that those per-

(Testimony of Fred Dixon.)

sons are part of the appropriate bargain unit or that they are not? A. They are not.

Q. How about the watch repairer, or jeweler?

A. They are not eligible.

Q. And are or are not part of the appropriate bargaining unit? A. They are not.

Q. What about the linoleum layer?

A. No, we don't claim linoleum layers.

Q. As eligible for membership?

A. They are not eligible for membership.

Q. Are they or are they not a part of the appropriate bargaining unit? A. They are not.

[273]

Q. (Mr. Walker continuing) Do you know whether or not Montgomery Ward, at its retail store, employs an employee known as a service record clerk? A. Yes.

Q. Is such type of individual eligible for membership in the Retail Clerks? A. No. [274]

Mr. Ball: It is stipulated that the employees described by the following descriptions are actually employees of Montgomery Ward & Company, and that these types of employees are types which the witness Dixon would claim were not eligible to membership in the Retail Clerks' Union, and should not be included in the appropriate unit.

Trail Examiner Bokar: Is that satisfactory?

Mr. Walker: Yes.

Trial Examiner Bokar: All right. Will you set forth the particular classifications under the stipulation?

(Testimony of Fred Dixon.)

Mr. Walker: Cashier other than floor cashier; display manager; adjuster, typist, assistant cashier, abstract clerk, calculator operator, sign writer, timekeeper, purchase control, secretary, advertising manager, window trimmer, copywriter, invoicer, credit clerk, bookkeeper, assistant credit manager, collector, service supervisor; service man, tailor, watch repair; linoleum layer; service record clerk, stockroom supervisor, receiving clerk, delivery supervisor, elevator operator, porter, doorman, traffic, matron, building service, detective; also, all department heads. All such persons, in addition, designated as "Saturday extras".

Mr. Ball: It is further understood that the following classes of employees are also employed by Montgomery Ward & Company at their Portland retail store, and that they are the [277] employees which the witness Dixon says are eligible for membership in the Retail Clerks' Union, and are within the group which the witness contends should be treated as an appropriate unit for bargaining purposes.

Trial Examiner Bokat: Is that agreeable?

Mr. Walker: Yes.

Trial Examiner Bokat: All right, will you set forth the particular classifications under that stipulation?

Mr. Walker: Floor cashiers, display helper, tire mounter, stockman, order filler, marker, messenger, sales person, outside salesman.

Q. (Mr. Walker, continuing) I call your atten-

(Testimony of Fred Dixon.)

tion to paragraph 7 of the complaint describing the appropriate bargaining unit consisting of retail clerks employed in the Respondent's Portland store engaged in selling there. [278]

Q. The complaint in this case says that the appropriate unit shall consist of Retail Clerks engaged in selling in the retail store, and you contend that the unit is more inclusive than the one set forth in the complaint; do you?

A. Yes, they have other people that automatically do not come under any other International Union, and we have to take those people in our organization.

Q. And those classes you have already set forth in the stipulation? A. Yes.

Q. And those are to be included in the unit?

A. Yes.

Q. Is that the unit that you claim to have been bargaining for when you met with the respondent? [280]

A. I definitely explained our position when we attempted to negotiate.

When and where, and with whom did you discuss the different classes of employees that your union claims to represent?

The Witness: At our first meeting in September with Mr. Powell, Mr. Barth and Mr. Barr.

Trial Examiner Bokar: What did you say with regard to the classification of employees that your union represented?

The Witness: They asked our union what type

(Testimony of Fred Dixon.)

of people we were representing, and I explained what type, all verbally, you understand.

Trial Examiner Bokat: I understand. [281]

Trial Examiner Bokat: Is that what you told them, that you represented those classes of employees set forth in Section 2 of the contract? Did you state that you claimed to represent those types of employees?

The Witness: I would like to have a copy to look at.

Trial Examiner Bokat: All right, look at this (handing copy to the witness.)

The Witness: Yes.

Trial Examiner Bokat: You specifically mentioned window trimmers and assistants; mail order department employees; floor cashiers; outside salesmen; marking room employees; bundle wrappers; and all other employees not coming under the jurisdiction of any other union excepting executives?

The Witness: Yes.

Trial Examiner Bokat: Is that what you told them?

The Witness: Yes.

Trial Examiner Bokat: Specifically?

The Witness: With the exception of, like a window trimmer,—for instance, they have different definitions in different stores. They have a description, and they have a certain work to do, and the division of work of even a window trimmer in any two stores is not the same. No employers in the

(Testimony of Fred Dixon.)

United States would use the same term, or have exactly the same kind of work for any classification. That is, they would [282] have generally the same type of work, but they may classify them different because of other additional duties that they may have.

Trial Examiner Bokar: You have already gone into that. What was the reply of the representative of the company? You stated that at that time the company said something about the office workers coming in.

The Witness: They wanted us to include the office staff in the bargaining unit.

Trial Examiner Bokar: What was your reply to that?

The Witness: I stated to the Company that they had a direct charter under the American Federation of Labor, and that there was an Office Workers' organization here, and we had no right to bargain for any other International Union but our own, but that we could bargain for our own union and no other international union.

I stated that is what we should do.

Trial Examiner Bokar: You did, subsequently, however, send a letter to the company in which you made some reference to bargaining jointly, or both unions bargaining jointly?

The Witness: Yes. The Company contended that we should, and, in fairness to the company we agreed that we would attempt to do that, or that we would

(Testimony of Fred Dixon.)

ask the Office Workers to bargain jointly with us on the contract, so as to speed up the negotiations.

[283]

Trial Examiner Bokat: All right. Was there a separate contract submitted on behalf of the office employees, or was Board's Exhibit 7 considered to be a contract that would include the offieworkers?

The Witness: After the letter was sent, the employees,—office employees were present when we presented our contract, and they were there to present theirs.

Trial Examiner Bokat: And they presented theirs?

The Witness: No, they did not, but they were there.

Trial Examiner Bokat: But they never did present it?

The Witness: No, because it was not taken up; however, they were there to present their contract.

Mr. Ball: Of course, I call the Examiner's attention to the fact that there are a good many opinions and conclusions in these answers.

Trial Examiner Bokat: I understand that. But what I am trying to find out is whether or not these Office people and Retail Clerks were attempting to negotiate one contract, or whether they were attempting to negotiate two separate contracts, meeting jointly; and that is what I am attempting to find out.

The Witness: It states at the bottom of our letter:

(Testimony of Fred Dixon.)

“This is to notify you that we are willing to negotiate a contract for the entire retail store. We are agreeable that the negotiations cover the office workers as well as the Retail [284] Clerks, that one contract be signed covering the entire retail store, and that such contract will be negotiated by both unions involved at one time, and if an agreement can be reached, it will be signed by both unions involved.”

Trial Examiner Bokar: That is the point that I am trying to get at. There is in evidence a proposed contract which claims to cover the Retail Clerks' Union?

The Witness: Yes.

Trial Examiner Bokar: In other words, you did not submit one contract which did cover both the Retail Clerks and the Office Workers Union?

The Witness: I think that the Examiner fails to realize that we had a meeting with the company before, and we had submitted a contract to the company before that.

Trial Examiner Bokar: I understand.

The Witness: But they brought in the Office Workers, and it was in fairness to the company that we agreed to bring the Office Workers into those negotiations,—not to bring the Office Workers into our Union, because we wouldn't have any right to take the Office Workers.

Trial Examiner Bokar: I am not trying to infer that you were attempting to take the Office Workers into your Union. I was merely attempting

(Testimony of Fred Dixon.)

to understand whether you were trying to negotiate one contract for both unions, because the letter seems to infer that one contract would be signed covering both [285] unions.

The Witness: Yes, we do that with other firms, but we would include their conditions in our contract. That is, we would put the two contracts together. While both of them would be negotiated separately and finally agreed upon, neither one would be signed until both were agreed upon, covering the conditions for both types of work.

Trial Examiner Bokat: I think that is sufficient.

Q. (Mr. Walker, continuing) When was Board's Exhibit No. 7 first drawn?

A. Oh, I would say that it was in July or August; I don't recall the exact date.

(Thereupon a document was marked as Board's Exhibit 9 for identification.)

Mr. Walker: It is hereby stipulated and agreed that what has been marked as Board's Exhibit 9 for identification may be received without further identification.

Trial Examiner Bokat: Is it so stipulated?

Mr. Ball: It is so stipulated. I object, however, to the receipt of this exhibit on the ground that it is immaterial to any issues in this case, and incompetent to prove any issues in this case.

Trial Examiner Bokat: Are you offering the constitution and by-laws of the Retail Clerks' Union?

(Testimony of Fred Dixon.)

Mr. Walker: Yes. [286]

Trial Examiner Bokat: I will receive it in evidence, and it may be marked in evidence as Board's Exhibit No. 9.

(Whereupon, the document heretofore marked as Board's Exhibit No. 9 for identification was received in evidence.)

Mr. Walker: I have no further questions of the witness.

Mr. Landye: No questions.

Cross Examination

Q. (Mr. Ball) Do you recall that on August 30, you and Mr. Langford called on Mr. Barth?

A. Yes.

Q. Do you recall that Mr. Barth said at that time that the matter which you wanted to present had to be referred to the company's labor relations representative at Oakland? A. Yes.

Q. You recall that while you left a proposed contract, nothing was discussed at that time except the matter of referring it to the labor representative, and having the labor representative present at the meeting when it was discussed? A. Yes.

(Whereupon a document was marked as Respondent's Exhibit 6 for identification.)

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's Exhibit No. 6, and I ask you if you have seen that before? [287]

(Testimony of Fred Dixon.)

A. No, I have not. That is the first time that I have seen it.

Q. You do know, however, that the Office Employees' Union had distributed bulletins to the employees of Montgomery Ward claiming that the Warehousemen and Retail Clerks were awaiting negotiations until the Office Employees could join with them?

A. Yes, we heard of that.

Mr. Ball: Is there any dispute that this was distributed?

Mr. Walker: No.

Mr. Ball: I would like to offer it in evidence.

Trial Examiner Bokat: Is there any objection to the respondent's offer of exhibit 6?

Mr. Walker: No.

Trial Examiner Bokat: There being no objection, it will be received and marked in evidence as Respondent's Exhibit 6.

(Whereupon the document heretofore marked as Respondent's Exhibit 6 for identification was received in evidence.)

RESPONDENT'S EXHIBIT No. 6

September 9, 1940

Office Workers

Montgomery Ward and Co.

Portland, Oregon.

Contrary to reports being circulated we are continuing to hold organizational meetings for the

(Testimony of Fred Dixon.)

office workers of your company. Meetings are held every Tuesday evening in the Masonic Temple, 1119 S. W. Park Ave. at 8 P. M. Directions to meeting place are plainly posted in lobby.

The Warehousemen's and Retail Clerks unions are not as yet proceeding with negotiations for their people with your employer because they are desirous of giving you office workers all the opportunity possible to join your union so that all three unions may negotiate at once; the advantage of such a plan is obvious. However, it is becoming more and more apparent that these two unions cannot delay any longer because of the demand for action from their people in your plant; consequently, we are forced to take this opportunity to tell you that any further delay on the part of those of you in the office will be very much to your disadvantage. We urge you to act immediately for the betterment of your personal wages, hours and working conditions.

Very truly yours,

OFFICE EMPLOYES UNION No. 16821

J. HOWARD HICKS,

Secretary.

OEU:16821

AFL:127

Q. (Mr. Ball) Your Union had occasion to distribute quite a bit of literature to Ward employees from, say, September 1st on?

(Testimony of Fred Dixon.)

Mr. Walker: I will object to that as incompetent, irrelevant and immaterial.

Trial Examiner Bokat: Overruled at this time.

[288]

A. That my union had been distributing literature after September 1st?

Q. (Mr. Ball, continuing) You did distribute papers to Montgomery Ward employees after September 1st?

A. No, not to my knowledge.

Q. You never did distribute any literature to Ward employees after September 1st?

A. Not to my knowledge.

Trial Examiner Bokat: Did the Union distribute any circulars?

The Witness: No. If they did, they worked on their own and not on the instruction of the union.

Trial Examiner Bokat: All right.

Q. (Mr. Ball, continuing) On September 9, you phoned Mr. E. L. Barth, did you not?

A. I would say, probably, yes. I would not recall the date exactly.

Q. And you asked him at that time whether you could not have a meeting on September 18 with Mr. Powell? A. Yes.

Q. And Mr. Barth promised to write Mr. Powell by air mail to find out if that date was agreeable?

A. Yes.

Q. And all that was discussed in that phone call was whether Mr. Powell could come?

(Testimony of Fred Dixon.)

A. That is right. [289]

Q. And up to that time, there had been no further discussion concerning anything else?

A. No.

Q. On September 18, Mr. Barth phoned you that September 19 would be more satisfactory to Mr. Powell? A. Yes.

Q. And September 19 was satisfactory to you?

A. Yes.

Q. That was the extent of that particular phone call? A. Yes.

Q. You recall that at the meeting on September 19, at the old Heathman Hotel, Mr. Powell stated that the company was ready to discuss the proposals, but not to be understood as recognizing any particular unit set forth in the contract, or the units set forth in the contract as the proper unit for their employees? A. Yes.

Q. And Mr. Landye said that there could be no discussion without that recognition? A. Yes.

Q. And you made the statement that the appropriate units were those engaged in retail selling?

A. No, I didn't make that statement.

Q. And Mr. Powell stated to you that in view of the company, the entire store was an appropriate unit? [290]

A. Yes.

Q. And Mr. Landye said that your union would still be able to bargain for the entire store, because it had a majority of the entire store?

(Testimony of Fred Dixon.)

A. I would state that we could not, if we wanted to, because there were other Internationals involved.

Q. But he did make the statement, did he not, that the union had the majority of the employees in the store?

A. Coming under the Retail Clerks' unit?

Q. He said that, irrespective of the unit, you had the majority of the employees in the entire retail store? A. I don't recall that.

Trial Examiner Bokat: You mean his union, or all the A F of L Unions combined?

Mr. Ball: That *is* union had enough signed up to constitute a majority of all the employees.

Trial Examiner Bokat: Did he say that?

The Witness: I don't recall that, no.

Q. (Mr. Ball, continuing) And then Mr. Landye outlined the three alternative methods of finding out how many employees had selected your union as representative? A. Yes.

Q. And Mr. Powell said that he had no authority to accept these alternatives, but would advise the Union after he had considered the matter? [291]

A. Yes.

Q. And that was all the discussion that took place at that meeting, was it not?

A. Well, it took a couple of hours, and we set a date when the deadline was that they would reply, and that was set as Monday, the 23rd, and he said that they would have an answer by that time.

(Testimony of Fred Dixon.)

Q. And on September 20, Mr. Barth called you and told you that the company at that time had rejected the alternatives until after the problem of an appropriate unit could be determined?

A. No, I don't recall any call like that.

Q. You say now under oath that no such call was made to you on September 20?

A. I say that I don't recall.

Q. You are not denying that the call was made?

Mr. Walker: Just a minute. He said that he had no recollection. He can't possibly be called upon to answer a question like that.

Trial Examiner Bokar: I think that the answer is quite definite.

Q. (Mr. Ball, continuing) Now, on the morning of September 25, you called Mr. Barth, did you not? A. September 25?

Q. Yes. A. I might have, yes. [292]

I don't recall these dates, because I haven't anything in my book as to when I called Mr. Barth.

Q. You have no memoranda which indicates when the calls took place?

A. I have memoranda of meeting calls, but not just a phone call.

Q. Do you recall that when you called Mr. Barth, on or about September 25, that Mr. Barth repeated to you again the fact that they could not accept the three proposals while the appropriate unit had not been agreed upon?

(Testimony of Fred Dixon.)

you and the company, other than the ones that you have covered here on cross examination?

A. Not to my knowledge.

Q. On September 30, Mr. Barth notified you that we would accept a letter if you stated what percentage of the employees in the retail store your unions had?

A. I don't recall him saying that we had to have that in the letter. I read the letter to him over the phone. I recall that, I believe. If I recall it correctly, he wanted to know,—just a minute. I read it to him, and then wanted to know if it was satisfactory, and if it was satisfactory, I would mail that letter to him. And, if I recall, it was satisfactory to him, and I mailed it to him. It was signed by Mr. Hicks and myself.

Q. You testified that nothing was said in the letter about inserting in the letter the number of employees that you claimed to represent? [295]

A. We discussed it, but I don't recall that they asked us to put that in the letter.

Q. But they may have, so far as your present recollection is concerned?

A. They may have, but I don't recall.

Q. Then you recall that Mr. Barth arranged for a meeting to be held with you October 22?

A. Yes.

Q. Now, at the meeting of October 22, which was held at the Heathman Hotel, Mr. Hicks, Mr.

(Testimony of Fred Dixon.)

Langford and yourself were present, and Mr. Powell started the meeting by asking if you could give him the exact number and percentage of employees which were represented? A. I believe so.

Q. And you stated that you represented 175 employees, which you said was 95 per cent of those eligible for membership in your union?

A. I don't recall giving him any figures. I recall saying that we represented between 85 and 90 per cent.

Q. You deny that you gave any figures?

A. I don't recall giving any figures. I used the term of percentage. I don't know why I would have used figures in that instance.

Q. You recall Mr. Hicks stating that he represented 25 employees in the retail store, which was, he thought, 70 per cent. of the [296] remainder?

A. I recall him saying that he represented 75 per cent. I don't recall him saying how many. He said "75 per cent." because I inquired how many he had, and that is the answer that was given.

Q. And then you pointed out that between the two of you, you represented the majority of the entire number of employees of the retail store?

A. Covering our jurisdiction.

Q. You also testified that you represented a majority of all the employees in the retail store?

A. No.

Q. You swear under oath that you did not make that statement?

(Testimony of Fred Dixon.)

Mr. Walker: Counsel has been doing that time and time again, and it is perfectly obvious what the purpose is in phrasing a question like that.

Trial Examiner Bokat: Sustained as to the form of the question. I believe the witness realizes that he is under oath, and has been duly sworn. Just re-frame your question.

Q. (Mr. Ball, continuing) Do you now state positively that you did not make any claim to represent a majority of the employees in the entire retail store?

A. No, because, how could I? I have not the jurisdictional right under the American Federation of Labor law.

Mr. Ball: I move to strike the answer as argumentative. [297]

Mr. Walker: Just a minute. I submit that counsel asked for it, and that is what he got.

Trial Examiner Bokat: I will let it stand for what it is worth. The expression of the witness "How could I?" is somewhat argumentative, but I will let it stand for the purpose of saving time only.

Q. (Mr. Ball, continuing) You definitely state that you did not at any time during the meeting make the statement that you represented a majority of all the employees?

Mr. Landye: That has already been asked and answered. He has been arguing with the witness for the last five minutes.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: Sustained as to the objection. I don't agree that he has been arguing with him for five minutes.

Q. (Mr. Ball, continuing) You then suggested that the proposed agreement be discussed, section by section? A. Yes.

Q. Did Mr. Powell agree? A. Yes.

Q. And then you asked for Section 1 of the agreement to be discussed, and you asked if that agreement was acceptable? A. Yes.

Q. And Mr. Powell then stated that he could not agree, and stated his reasons why he could not agree to that clause? A. Yes.

Q. And then you stated that you were surprised that this question [298] was raised, did you not?

A. Yes, I believe that I did.

Q. And then you stated that unless the company would agree to Section 1 as written, there was no reason for further discussion?

A. No. I stated this: that all other contracts with our International Union, those contracts must provide some kind of union shop clause, and I said that our International Union has to accept all these contracts after they are negotiated, and we are continuously warned by our International Union not to enter into any agreement unless it provides for a union shop clause for representation, and I said that I was not at liberty to accept a union shop clause unless it provided some protection for our International Union.

(Testimony of Fred Dixon.)

Q. And then you mentioned the fact that you had an A F of L conference in Cleveland last summer, where certain rules were laid down for you?

A. Yes, but it was not a constitutional amendment. It was a general discussion as to what representatives should look out for.

Q. And then Mr. Powell said that he could not agree to that particular clause in the contract?

A. Yes, and I asked him for a substitute.

Q. You asked him for a substitute or a counter-clause?

A. Yes, on that clause, and on the contract.

[299]

Q. You asked for a substitute for that clause?

A. Yes, certainly. It is a part of the contract.

Q. And you said that you would have to return to the employees if you didn't have that clause?

A. I said that I would have to return back to the employees with their proposal.

Q. That is, a counter proposal on that clause?

A. Not only that clause.

Q. Now, you did not at any time in that session ask for any general counter proposals to any contract which you had not discussed in detail?

A. When?

Q. At this meeting of October 22?

A. Asked for a counter proposal?

Q. Yes. A. Yes.

Q. For more than just this section ?

A. I asked for the entire contract counter proposal; a counter proposal on the entire contract.

(Testimony of Fred Dixon.)

Q. Then, why didn't you discuss the entire contract with the representatives of the company?

A. For the simple reason that the main part of our discussion was a dispute as to the first section.

Q. And you stated that that dispute had to be settled before any other discussion was worth anything [300]

A. No.

Q. What did you say?

A. I stated that, before we could make any modifications on the rest of the contract, we would have to have some form on the first part of the contract,—some offer on the first part of the contract, in some form.

Q. You did say, Mr. Dixon, that this was the main part of your contract, this Section 1, didn't you?

The Witness: May I have that question again?

Trial Examiner Bokat: Will you read the question?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

A. I argued for that section of the contract, yes.

Q. (Mr. Ball, continuing) You did say that it was the main section of the contract, didn't you?

A. I said all our contracts with our employers, if we relinquished that part of the contract, we must cancel that particular clause with other employers.

Q. You used the term, that it was the main part of the contract, didn't you?

A. No.

Q. You used the term a minute ago,—

(Testimony of Fred Dixon.)

A. I analyzed,—

Mr. Walker: Let the record speak for itself on that.

Q. (Mr. Ball, continuing) You recall that you said something about the employees at Montgomery Ward having some grievance, as [301] the meeting broke up that day?

A. They had some grievances?

Q. You used the word "grievances" didn't you?

A. I don't recall.

Q. You don't recall any such conversation?

A. No.

Mr. Walker: That is repetitions.

A. (Witness continuing) I imagine that I did say "grievances", otherwise they would not affiliate with the union, probably.

Q. (Mr. Ball, continuing) Mr. Barth asked you if there were any complaints that existed about wages and hours, and you said there was none, didn't you?

Mr. Walker: Just a minute. I will object to that as a compound question.

Trial Examiner Bokar: Let me hear the question again.

(Thereupon the pending question was read aloud by the reporter as above recorded.)

Trial Examiner Bokar: Overruled.

Mr. Walker: Unless the witness can adequately answer the question as it stands, I think that it should be broken up into two parts.

(Testimony of Fred Dixon.)

Trial Examiner Bokat: If he can answer it as it stands, let him do so; otherwise, he may indicate that he cannot.

A. I never answered the question that there was no dispute over hours. [302]

Q. (Mr. Ball continuing) You say definitely that you made no such statement?

A. Yes.

Q. And that statement is just as true as the rest of your testimony?

Mr. Walker: I will object to that.

Trial Examiner Bokat: Sustained. Do you want to state something?

The Witness: I want to state this, that I made a statement to Mr. Barth that various employers have thought because their employees wanted to join the union that they are dissatisfied with the company; that is not so. People do not join a union because they are dissatisfied with the employer in every sense, but they do want uniform conditions?

Q. (Mr. Ball, continuing) You did mention that you didn't know of any dispute about wages and hours?

A. I said grievances against Mr. Barth,—that the employees didn't have any grievances against Mr. Barth.

Q. You recall that you called Mr. Powell the following day, October 23?

A. That I called Mr. Powell?

Q. Yes. A. At the Heathman Hotel?

(Testimony of Fred Dixon.)

Q. Yes. A. Yes. [303]

Q. You said that because the company could not agree to Section 1, you thought that the company should make a counter proposal?

A. I had taken that up at the previous meeting,—counter proposal?

Q. You didn't make that statement on October 23?

A. Yes, I made the statement that they should make a counter proposal.

Q. On Section 1?

A. Not as to Section 1 but as to the entire contract. I said that we would take the counter proposal from the company to the employees, to see what they wanted to do about it.

Q. Now, Mr. Dixon, did you or did you not say, in exactly these words, "Since the company could not agree to Section 1, the Company should make a counter proposal"?

A. I recall the counter proposal, but I didn't say as to Section 1.

Q. Do you deny that you said it that way?

Mr. Walker: I will object to that.

Trial Examiner Bokat: I will let it stand. Will you read the question back, Mr. Reporter?

(Thereupon the question referred to was read as follows:

“Now, Mr. Dixon, did you or *did not* say, in exactly these words, ‘Since the company could

(Testimony of Fred Dixon.)

not agree to Section 1, the Company should make a counter proposal' ") [304]

Q. (Mr. Ball, continuing) Did you or did you not say it that way?

A. I will put it this way: I said that if they couldn't agree to the contract, they should give us a counter proposal.

Mr. Ball: May I have an answer to the question?

Q. (Mr. Ball, continuing) Did you or did you not say that, "Since the Company could not agree to Section 1, they should make a counter proposal"?

A. No.

Q. You did not say that they should make a counter proposal to Section 1? A. No.

Q. Do you deny that you said it?

A. Yes.

Q. And didn't Mr. Powell state to you that the work of organizing the employees should be left up to the employees and not to the company?

A. No.

Q. Do you say that he did not say that?

A. I say that I don't recall him saying that. I don't know whether he did or not.

I don't recall him making that statement.

Q. You do recall that he said that, since the union only discussed one section, no counter proposal for the entire contract was called for? [305]

A. No, I don't recall him saying anything like that.

(Testimony of Fred Dixon.)

Q. Do you deny that he said it?

A. Yes, I will deny that he said it.

Q. You now under oath state that Mr. Powell did not make that statement to you? A. Yes.

Q. You deny it? A. Yes.

Mr. Walker: I will object to that. That is repetitious and improper in form.

Trial Examiner Bokat: Yes, but it has been answered. Let us proceed.

Q. (Mr. Ball, continuing) Now, do you recall that you then asked Mr. Powell when the remaining provisions of the proposed contract made by you could be discussed? Do you recall that?

A. No. I still stand on my last answer, that I didn't ask for any counter proposal on Section 1. I did not ask for any discussion on the balance,—

Q. Do you now deny—

Mr. Walker: Just a minute. Let him finish his answer.

Trial Examiner Bokat: Yes.

The Witness: I deny that at any time I asked for a discussion on the balance of the contract. I stuck on them giving us a counter proposal.

Q. (Mr. Ball, continuing) And you never asked for a discussion [306] on the remainder of the contract?

A. You are speaking of this meeting here, and I am answering you for this meeting. If you want to go further, that is a different story. At this meeting, when Mr. Powell was in town, he left with the

(Testimony of Fred Dixon.)

instructions that they was going to think it over on the matter of the counter proposal. My answer to Mr. Powell was for him to give us a counter proposal, and he left with the thought in mind that he would contact, maybe it was you,—I don't know who he was to contact,—

Mr. Ball: I move to strike that statement that Mr. Powell left town with the thought that he would do so and so.

Mr. Walker: You have been digging into the witness, digging and digging at him, and you asked for the very answer that you got. I don't think that there is anything that should be stricken.

Trial Examiner Bokat: I will strike it out, what Mr. Powell thought. As to the rest of the answer, I will let it stand.

Q. (Mr. Ball, continuing) Up to that time, you had not discussed with him the remaining provisions of your contract, other than Section 1?

Mr. Walker: I will object to that as having been asked and answered.

Trial Examiner Bokat: Sustained.

Q. (Mr. Ball, continuing) Either on October 23, or before, had you asked for any discussion of the remaining provisions of that [307] contract?

Mr. Walker: Same objection.

Trial Examiner Bokat: I will let it stand.

A. Yes, tentatively he agreed with me to give the counter proposal some thought. He said that he would take it under advisement. So we didn't go

(Testimony of Fred Dixon.)

into the contract and just discussed generalities, about conditions in general, and so on.

Q. (Mr. Ball, continuing) You say that Mr. Powell agrees with you to give you a counter proposal in the form of a different contract?

A. I have answered that question.

Q. Answer that question "yes" or "no".

Trial Examiner Bokart: Just a moment. I don't think that he can answer that "yes" or "no". In a sense it is repetitious; the witness has already testified as to that twice, that Mr. Powell was going to determine or consider whether they were going to make any counter proposal to the contract, or to contact Chicago. I don't know that he used those exact words, but that is the impression that I got from the testimony. Let's see if I can get it clear. Will you read the last question, Mr. Reporter?

(Thereupon the question referred to was read aloud by the reporter as follows:

"You say that Mr. Powell agreed with you to give you a counter proposal in the form of a different contract?")

Trial Examiner Bokart: You may answer that "yes" or "no". [308]

A. He did not agree. I will have to state the history. He would not agree to anything, to be truthful about it.

Mr. Ball: I move to strike that as an opinion and conclusion of the witness, that he would not agree to anything.

(Testimony of Fred Dixon.)

Mr. Landye: Mr. Examiner, on these questions, the way they are being asked, in an argumentative form, I will object. And I will object particularly to this question as having already been asked and answered three or four times.

Mr. Ball: May I state for the record that I am dealing with a very evasive witness, and constantly interrupted by objections of counsel, which permits the witness to understand what counsel want him to be on guard against, and I must have some latitude,——

Mr. Walker: That shows that counsel is just the kind of an attorney that I thought counsel was. The witness has been answering the questions directly, and whenever the witness stated that he didn't recollect, counsel has prodded him with some very improper questions, in an attempt to mislead the witness by the sort of questions he has asked the witness.

Trial Examiner Bokar: I think that we have had enough of this petty bickering. We have gotten along very fine up to this time, and I don't see why we should not continue in the same spirit. I know it is getting towards the end of the day and everybody is tired, but let us relax. Let us have the question. I don't want all the objections, but let me hear the question. [309]

(Thereupon the question referred to was again read aloud by the reporter as follows:

(Testimony of Fred Dixon.)

“Q. You say that Mr. Powell agreed with you to give you a counter proposal in the form of a different contract?”)

Trial Examiner Bokart: Try to answer that. We will strike out the previous answer, and start over again.

A. I did not state that he agreed. We tried to persuade him to agree on giving us a counter proposal. I myself stated there at this meeting, that I desired a counter proposal. Later on, I stayed at the meeting for about two hours after the rest of them left, and it got to more or less *or* a friendly discussion,—not an argument,—as to what our future relationships with Montgomery Ward would be, and I was convinced that Montgomery Ward would negotiate with us at that time, and I wanted them to submit a counter proposal. Mr. Powell said that he was not at liberty to submit a counter proposal, but said that he would consider the thing,—not that he agreed, but that he would consider it. And those are the facts.

Q. (Mr. Ball, continuing) Now, didn't you ask him at that time when he would next be in Portland for a discussion?

A. Yes, and he said that he was not quite sure. He said in about two weeks.

Q. And he mentioned the fact that he intended to be in Portland when Mr. Estabrook asked for a meeting?

(Testimony of Fred Dixon.)

A. I don't recall that. I don't recall him saying that. [310]

Q. And you said to him, did you not, that you would keep in touch with Mr. Estabrook to find out when he would be in Portland?

A. I did what?

Q. Did you or did you not say that you would keep in touch with Mr. Estabrook and find out when Mr. Powell would be in Portland?

Mr. Walker: Same objection.

Trial Examiner Bokat: Overruled.

A. I don't recall saying that I would keep in touch with Mr. Estabrook.

Q. (Mr. Ball, continuing) Now, you recall on November 12 Mr. Powell telephoning you?

A. Yes.

Q. And he told you at that time that he was in for this meeting with Mr. Estabrook?

A. No. Mr. Powell called me up about five o'clock, at the time I was about ready to leave the office. He said that he had had a meeting all day, or a part of the day, with Mr. Estabrook, and that he was through with Mr. Estabrook, and wanted to know if I could meet with him the next day. I told him I was sorry that I could not, because I was leaving for San Francisco to attend a conference there which had been set for about six months previous.

Q. Mr. Powell stated to you that the thing to

(Testimony of Fred Dixon.)

do was to sit down and discuss the remaining provisions of the contract, didn't [311] he?

A. No, the discussion was very brief. He said, "You are leaving for San Francisco. Can you let me know where you are staying in San Francisco?"

And I said, "Yes, I can. I will be stopping at the Empire Hotel in San Francisco," and he told me that he would be there around Saturday himself.

Q. And didn't he suggest to you that the purpose of the next meeting with you would be to discuss the remaining provisions of your proposed contract?

A. No, he didn't say the remaining provisions.

Q. Other than Section 1?

A. He said that he wanted to meet with me. I don't recall him saying what he wanted to discuss.

Q. Have you any memorandum of your various discussions, to refresh your recollection?

A. I have in my head.

Q. You are speaking entirely without any memorandum of what was said in the meetings?

A. No, we don't take down minutes of meetings and discussions, no.

Q. Isn't it a fact that when Mr. Powell suggested the meeting, you stated that you would be glad to have a meeting with him when you got back to Portland, and you asked him if he could meet you the first of the following week, and he mentioned that [312] he would not be back from Oakland until the first of the following week?

(Testimony of Fred Dixon.)

A. I said that I would be in Oakland by Saturday.

Q. But not before Saturday?

A. That if he would contact me, if I would stay over and get over to Oakland by Saturday.

Q. Didn't you say that you had to come back to Portland?

A. No; I said the conference ended on Saturday. He asked me specifically if I would be willing to go over to Oakland and see him.

Q. How did that come about?

A. Well, he asked me if I would lay over in Oakland.

Q. Until the first of the following week?

A. Yes.

Q. Didn't you suggest that he come to Portland the week of November 25?

A. Not to my knowledge; I don't recollect.

Q. In the course of this telephone conversation, didn't you suggest to Mr. Powell that he come to Portland the week of November 25?

A. I don't recall the dates there, but I asked him to set the date.

Q. And Mr. Powell replied that he could not be sure to be,—he could not be sure at present whether he could get back that week? [313]

A. Yes.

Q. And you said that you would not be down in San Francisco or Oakland again until the latter part of December, after this trip?

(Testimony of Fred Dixon.)

A. That I would not be back in Oakland until December?

Q. That you would not be making a second trip to Oakland until the latter part of December.

A. No, I couldn't have said that, because I have made only one trip to San Francisco. There would be no reason for me going to San Francisco; I would have no business there.

Q. Mr. Powell stated that he would call you the next time he was in Portland, didn't he?

A. No. He agreed to contact me in San Francisco.

Q. And you stated at that time that you had not kept in touch with Mr. Estabrook, and had forgotten to do so?

A. No, sir.

Q. You deny that?

A. Yes.

Q. Are you acquainted with Thomas White?

A. I have met him in San Francisco.

Q. Do you know about the formation of this committee to speak for the A F of L against Montgomery Ward in the eleven Western States?

A. The formation of a committee to speak against Montgomery Ward? [314]

Q. To deal with Montgomery Ward in the eleven Western States?

A. Using the term "to speak against Montgomery Ward", I don't know of any committee like that.

Q. To negotiate with Montgomery Ward and to

(Testimony of Fred Dixon.)

deal with Montgomery Ward in the eleven western states?

You know of such a committee?

A. Yes. I was tentatively on one of the committees.

Q. You knew that Mr. White was the spokesman for that committee, did you not?

A. Yes.

Q. And that committee was to speak for both the warehousemen and the retail clerks?

A. Well, they represented the general organizations that were to start negotiations, with the understanding that the Local Unions would ratify or accept anything, or reject it.

Q. But they had that authority, to start negotiations, in the beginning? A. Yes.

Q. On November 25, you called Mr. Barth and asked to have an appointment, stating that you wanted to meet with company representatives on December 9 and 10?

A. I asked the Company to meet with us?

There was so many calls during that week, I couldn't recall.

Q. And during the course of that call, you stated that you thought the company was stalling in order to get through the [315] Christmas season, didn't you? Didn't you bring up the Christmas season?

A. You mean did I make the statement to Mr. Barth?

Q. Yes, you made that statement to Mr. Barth?

(Testimony of Fred Dixon.)

A. I made the statement to Mr. Barth that I thought the company was giving us the runaround in refusing to meet with us.

Q. Did you not make a statement that had particular reference to the Christmas season, that you thought Montgomery Ward was attempting to postpone negotiations until after the Christmas season?

A. I don't recall making that statement.

Q. Well, do you deny that you made it?

Mr. Walker: I will object to that.

Trial Examiner Bokat: Yes.

Mr. Ball: Mr. Examiner, there is a difference between having the witness say that he doesn't recall or that he did not make the statement.

Trial Examiner Bokat: I understand that. I will reinstate the last question. Read it, Mr. Nelson.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Yes.

Q. (Mr. Ball, continuing) Mr. Barth said to you, did he not, that he thought that when the representatives of the company and you got together, that they could agree on many sections of the [316] contract?

A. Mr. Barth said this,—I don't know whether I should say it,—that he felt that our Local Union and Mr. Barth himself could get together on the terms of this contract, but it was entirely out of his hands, and it was up to the company to negotiate the contract.

(Testimony of Fred Dixon.)

Q. Didn't he state that between you and him and Mr. Powell, an agreement could be reached on the provisions of the contract, he thought?

A. He said that we were not so far apart, so far as he was concerned, on the agreement, and that if the Local Union and he,—that the Local Union and he could get together on the terms of the contract, and I was confident of that myself.

Q. That was on December 5?

A. I think so.

Q. Now, on the same day, Mr. Barth called you back, stating that he had talked with Mr. Powell on the telephone? A. I believe he did.

Q. And Mr. Powell,—and Mr. Barth said he had understood from Mr. Powell that a negotiator was appointed to represent the Retail Clerks and the Warehousemen in the eleven western states, and he mentioned that in the telephone call?

A. He stated that he felt that they were negotiating in Oakland.

Q. Yes. [317]

A. And I said that they were negotiating in Oakland for Oakland, while we were negotiating here for ourselves. And then I stated that, if, as I stated, we couldn't get together, and if it was too far for the company to be running between Portland and Oakland, that we authorized them to start dealings for us over there.

Q. That Mr. White had been authorized to represent you?

(Testimony of Fred Dixon.)

A. That he was to represent the Warehousemen's Council.

Q. And to speak for your union as well?

A. No. We had the Retail Clerks' representatives to speak for the International.

Q. But the committee, of which Mr. White was a spokesman, was to represent the Retail Clerks and the Warehousemen?

A. The committee, yes. In a general way.

Mr. Ball: I am through with this witness.

Trial Examiner Bokat: Any redirect?

Redirect Examination

Q. (Mr. Walker) I call attention to your testimony on cross examination to the effect that, in a telephone conversation with Mr. Barth, you stated that if the dealings were between the Local and himself, he felt that progress could be made, or words to that effect? A. Yes.

Q. Now, did Mr. Barth explain to you what position he held in the matter? [318]

A. Yes, he explained that he was the local manager, and on that type of matters, they were taken up higher, to men like Mr. Powell or representatives of that sort, and were not taken up with the local managers, and that the company had these men to deal on this type of matters.

Mr. Walker: That is all.

Trial Examiner Bokat: Mr. Dixon, it has been stipulated that a number of employees who have

(Testimony of Fred Dixon.)

been classified should be excluded or may be excluded as not being eligible for membership to your union. Can you state the reasons for their ineligibility?

The Witness: Well, the sign painters, take them as an example: they belong to the Sign Painters International Union. Also, take the watch repairmen, they belong to the Watch Makers. As the Company knows, their union of watchmakers, their employees, members of the Watch Makers' Union have been working for Ward's for years. Then there are the linoleum layers, and Mr. Barth knows that we have sat down in conference with those men in negotiating contracts. Then there are the Tailors, who have worked under a union set-up. As I understand it, from the Tailor's Union, Montgomery Ward is a party to the set-up of employers where the employers have agreed upon a wage stipulation. There are a number of organizations that work under that contract. I understand that Montgomery Ward is a member of the Association where these people are signed [319] up under a contract, and these Tailors have been working there under that set-up.

All these different set-ups, are set-ups that deal with different occupations, and under the jurisdiction of different International Unions. As to dealing with Montgomery Ward for various members of these different International Unions, which are affiliated with the A F of L, we have absolutely no

(Testimony of Fred Dixon.)

right to do so. They have a right to deal for themselves. If we wanted to deal for them, under the A F of L, we would get into a jurisdictional squabble. We couldn't stay in the A F of L and do that.

Trial Examiner Bokat: Do you know whether or not the Company has bargained with any other classifications of employees which you have just mentioned, such as the sign painters, the linoleum layers, tailors, and so on?

The Witness: I mentioned the tailors.

Trial Examiner Bokat: Excluding the tailors.

The Witness: I am speaking of one that I happened to be present at when a tentative settlement was made. That was with reference to the Linoleum Layers. They had a non-union linoleum layer that.——

Trial Examiner Bokat: I don't care about the details.

Mr. Ball: I think that the details are important, because it was not a collective bargaining session.

Mr. Walker: That is agreeable with me, that they have not [320] dealt collectively with the Linoleum Layers.

Trial Examiner Bokat: What I want to find out is why the Union excludes such classifications of employees from the appropriate unit.

The Witness: Because it is a craft organization.

Recross Examination

Q. (Mr. Ball, continuing) Of course, you are not attempting to tell us that you have repeated

(Testimony of Fred Dixon.)

everything, or exactly the words that Mr. Powell stated in the meetings that you had with him, but you are giving your recollection of the sense of his answers? A. Yes.

Q. You recall that at the first meeting, you asked whether the company would sign a contract?

A. That I asked whether the Company would sign a contract?

Q. Yes.

A. That is what we were negotiating for.

Q. Do you recall that Mr. Powell said that he did not know of any contracts that the Company had signed up to that date?

A. He stated that the company does not sign a contract. He said that they could agree to an agreement, but they did not sign a contract. I told him that I thought they did, and I thought that the company did have an agreement,——

Q. Did he say that they didn't sign, or hadn't signed? A. He said that they didn't sign.

Q. Are you sure that the word was not "hadn't" instead of [321] "didn't"?

Mr. Walker: Well, I will object to that.

Trial Examiner Bokar: Suppose that you reframe your question, Mr. Ball.

Q. (Mr. Ball, continuing) But he might have said that the company had not, and you misunderstood him and thought that he said that the company did not?

A. He made the statement that they did not sign

(Testimony of Fred Dixon.)

contracts. He didn't say they would not, but he stated that they did not.

Q. And he did add that they didn't know of any that they had signed?

A. I contended that they had, and I said,——

Q. (Interposing) You contended that they had?

A. I contended that they had, and he said there was no signed contract, to his knowledge.

Trial Examiner Bokst: Up to that particular time?

The Witness: That is right. Up to that particular time.

Trial Examiner Bokst: All right. Are there any further questions of this witness? The witness is excused.

(Witness excused)

Mr. Walker: Mr. Allen. I might state that Mr. Allen is a short witness.

S. EUGENE ALLEN

called as a witness by and on behalf of the Board, was examined after being duly sworn, and testified as follows: [322]

Trial Examiner Bokst: Give us your full name and address.

The Witness: S. Eugene Allen. I live at 1536 N. E. 58th Avenue.

Trial Examiner Bokst: What is your last name?

The Witness: Allen. (spelling)

(Testimony of S. Eugene Allen.)

Direct Examination

Q. (Mr. Walker) What is your occupation?

A. President of the Office Employees' Union.

Mr. Ball: I would appreciate it if you would speak up a little louder, Mr. Allen.

The Witness: Yes, I will. I am president of the Office Employees' Union.

Q. (Mr. Walker, continuing) How long have you held that position?

A. Oh, for about five,—four years, I guess.

Q. In your capacity as President of that organization, have you had occasion to meet with any of the representatives of Montgomery Ward & Company?

A. Yes, I did on three occasions.

Q. Were those the three meetings in December?

A. That is right.

Q. In any of those meetings, did you take part?

A. Do you mean, did I enter into the discussions?

Q. Yes. A. Yes, I did. [323]

Q. Can you fix which meeting it was?

A. I think in all three meetings, probably, but I recall particularly the things that were said by myself in the second and third of those meetings.

Trial Examiner Bokar: That would be on the 14th and 16th of December?

The Witness: That is correct.

Q. (Mr. Walker, continuing) Was a form of contract similar to Board's Exhibit 7 before the parties at each or both of those meetings?

(Testimony of S. Eugene Allen.)

A. Yes, I think there was at both of the meetings.

Q. What was said by you at the meeting of the 14th, or 16th?

A. I recall, of course, entering into discussions at times, now and then, a little bit, but principally, the thing that I recall was asking the company officials who were present,—I think it was on the 14th,—if they would sign an agreement with the unions which provided for the same hours, wages and working conditions as prevailed at the plant before the strike was called.

Q. Was there an answer to that question?

A. Yes.

Q. What was the reply?

A. Mr. Powell answered "no", and then Federal Conciliator Ashe asked some questions,—he asked the same question again, [324] perhaps rephrasing it, but essentially the same, and Mr. Powell replied to that, that he would have to consider the matter.

Q. What had occurred immediately prior to this time which prompted your question?

A. My asking,—are you asking why I asked the question?

Q. Yes.

A. Really, the reason I asked the question was because we were apparently making no progress, and I had doubts in my mind as to whether we could get a signed agreement. I doubted whether the company would sign any agreement.

(Testimony of S. Eugene Allen.)

Mr. Ball: I move to strike that as an opinion and conclusion of the witness, the doubts that the witness had in his mind.

Trial Examiner Bokat: Yes.

Q. (Mr. Walker, continuing) What had gone on previously?

A. The discussion centered, of course, around the agreement that had been proposed by the Union to the company.

Q. By the Office Workers?

A. Well, all three were being discussed jointly, and I think probably the Office Workers' Agreement had not been particularly mentioned up to this point.

Trial Examiner Bokat: Had one been submitted, a separate contract?

The Witness: Yes, one was submitted at this meeting of the 14th. [325]

Trial Examiner Bokat: You say that a contract was submitted on behalf of the Office Workers?

The Witness: Yes, on the second meeting. I am sure it was on the second meeting; that would be the 14th.

Trial Examiner Bokat: Do you have a copy of it?

The Witness: I don't have it myself.

Mr. Walker: I have a copy.

The Witness: I haven't one myself.

Trial Examiner Bokat: All right. I don't want to be premature.

(Testimony of S. Eugene Allen.)

Q. (Mr. Walker, continuing) What agreements were discussed up to that point?

A. The Warehousemen's agreement, particularly, with some reference to the Clerks. You understand that the agreements were largely identical in many parts, and while we discussed those particular parts, we were not specifically mentioning the Warehousemen, the Office Employees or Retail Clerks, because of their almost identical proposals.

Q. (Mr. Walker, continuing) Now, was there any discussion with any of the representatives of the company concerning that particular matter?

A. I don't know which matter you have reference to.

Q. Was Mr. Langford at that meeting?

A. Yes.

Q. At the meeting, which contract was discussed first, if you [326] recall, the Warehousemen or the Retail Clerks'?

A. That is right; the Warehousemen's.

Q. Was there any discussion about the manner in which the Retail Clerks' agreement would be discussed or gone over in relation to the Warehousemen's agreement?

A. Well, my recollection is that the discussion revolved largely around certain provisions that were common to all agreements, and it was assumed by all parties present that we would get down to the particular differentials in wage scales later on.

(Testimony of S. Eugene Allen.)

Q. Was anything said about the relationship of the Retail Clerks' Agreement to the Warehousemen's agreement?

A. I don't recall any particular discussion on that point.

Q. Now, do you recall anything further said by yourself at either of these meetings, the 14th or the 16th?

A. Yes.

Q. What was it?

A. I remember discussing some of the provisions of the agreements that were before us. On the meeting of the 16th, which would have been the last meeting, I recall that we went over the agreements of all three of the unions, section by section, in an effort to find something that we could agree upon there.

Mr. Ball: I move to strike "in an effort to", and what follows. [327]

Trial Examiner Bokat: That may be stricken.

Mr. Walker: That is all.

Trial Examiner Bokat: You may cross examine.

Cross Examination

Q. (Mr. Ball) You have something to do with the Oregon Labor Press, in addition to your position?

A. Yes.

Q. What is your position there?

A. I am the editor.

Q. I assume, in that connection, you keep in touch with most labor matters in Portland?

(Testimony of S. Eugene Allen.)

A. I assume I do, although some of my readers assume that I don't.

Q. Well, as a matter of fact, before you went into this meeting of December 13, you had discussed and knew that Mr. Landye was preparing charges against Montgomery Ward for failure to bargain collectively with the Warehousemen?

A. No, I did not.

Q. That is one bit of news that had escaped you before you went into the meeting?

A. Yes, I am afraid that was a scoop that I missed.

Q. Now, at the time of the discussions about the written contract, you recall Mr. Powell's first reply to your question, to the effect that your question was premature? Do you remember that he used the word "premature"? [328]

A. I don't recall that he did.

Q. Don't you recall,—

A. (Witness interposing) I am not denying it; I am saying that I don't recall it.

Q. Don't you recall that he suggested that the question of the form of agreement should be postponed until after the contents of the agreement had been decided upon or settled?

A. Well, there, again, it is possible that he did, but I don't recall it.

Q. Do you remember Mr. Denecke asking you then,—you know who Mr. Denecke is?

(Testimony of S. Eugene Allen.)

A. Yes.

Q. Whether or not your union would sign any contract that would just embody the present practices of the company in the matter of hours, wages and the like?

A. I don't recall whether it was Denecke. As a matter of fact, I have a recollection that Mr. Powell inquired if we were submitting that as a proposal.

Q. And you said no, that you were not? Whoever asked you the question?

A. I don't recall that I answered it, but I very probably would have answered it that way, if I did.

Q. Did Mr. Powell state that it was a hypothetical question? You remember he used the phrase "hypothetical question"?

A. I don't remember that.

Q. You are not denying it? [329]

A. Well, there was lots of discussion and talk. He may have used a word, and I would not recall it.

Q. Now, you will recall that there was considerable discussion in detail about a number of sections in the contract that could be agreed upon, and that discussion did take place?

A. I am sorry. Will you read that again?

Trial Examiner Bokat: Yes, will you read the question back to the witness, Mr. Nelson?

(Thereupon the last question was read by the reporter as above recorded.)

A. I don't recall any sections were agreed upon.

(Testimony of S. Eugene Allen.)

Q. (Mr. Ball) Do you recall a discussion of Section 4, for example, in the Retail Clerks' Union contract? On holidays?

A. I remember some discussion about the holidays. I remember that it was discussed.

Q. And you remember that was agreed upon, don't you?

A. As I recall it, the company asked if we would be willing to change one holiday. I believe it was Washington's Birthday.

Q. With that exception, it was agreed upon?

A. And they asked the Union, and the Union agreed to that.

Q. It was agreed to?

A. I don't know whether Mr. Powell agreed to it, by that language.

Q. At least, there was no further objection raised by the company to that section? [330]

A. I don't recall that there was.

Q. There were a number of other sections of the contract under the same category, similarly treated?

A. What do you mean by "similarly treated"?

Q. Where there was a minor change in the form of agreement, or in which there was no change?

A. There were some sections where it was apparent that we were not very far apart.

Mr. Ball: That is all.

Trial Examiner Bokart: Any redirect?

Mr. Walker: No.

(Testimony of S. Eugene Allen.)

Mr. Ball: Just a minute. May I ask another question?

Trial Examiner Bokat: Go ahead.

Q. (Mr. Ball, continuing) Mr. Allen, upon this matter of signing the contract, you will recall that Montgomery Ward caused an advertisement to be printed in the press that they would sign a contract and reduce it to writing if an agreement could be reached?

Mr. Landye: Anything that Montgomery Ward would cause to be printed, would be self-serving, and binding upon them, and not upon us.

Trial Examiner Bokat: That is correct. But he may answer the question.

The Witness: Now, what was the question?

Trial Examiner Bokat: Will you read the question, Mr. [331] Reporter?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

Mr. Walker: I object to that on the ground that the instrument speaks for itself, In answer to that, the document is the best evidence.

Trial Examiner Bokat: The objection is well founded, but I will permit it, to save time.

A. I don't recall every ad. I do recall them running some ads in the papers.

Q. (Mr. Ball, continuing) You do recall what they said?

A. Well, in a general way, yes, I do. Do you want me to tell what I recall they said?

(Testimony of S. Eugene Allen.)

Q. Yes, that would be a good way to test your recollection.

A. Yes, I think so; in fact, I am sure. They said that no dispute existed as to wages, hours and conditions in the plant, that the dispute was over a closed shop. Of course, they ran a number of days. I can't recall every one.

Q. How many?

A. I think they ran ads in both the Portland dailies for a couple of times, perhaps, during the earlier days of the strike. I think that they had two ads in each Portland daily, and then about two weeks ago, similarly.

Trial Examiner Bokar: Mr. Ball, are you going to try the case on what was said in the newspapers, or what took place in [332] the conferences?

Mr. Ball: I think it is obvious what the purpose is.

Trial Examiner Bokar: I assume you are offering it to show the good faith of the company. I am merely trying to find out.

Mr. Ball: It seems to me that the purpose of any published statement on the part of this respondent is certainly significant on the question of good faith.

Trial Examiner Bokar: If that is your position, all right. Do you have anything further?

Mr. Ball: I think not.

(Testimony of S. Eugene Allen.)

Redirect Examination

Q. (Mr. Walker) Were any ads run in the Oregon Labor Press?

A. I don't recall Montgomery Ward offering to buy any space.

Mr. Walker: That is all.

Trial Examiner Bokar: You are excused.

(Witness excused)

Trial Examiner Bokar: At this time, I will adjourn the hearing until 9:30 tomorrow morning. We are recessed until then.

(At 5:07 p.m. April 15, 1941, the hearing was adjourned to 9:30 a.m. April 16, 1941, same place.)

[333]

Proceedings

Trial Examiner Bokar: The hearing is now in session.

Mr. Walker: Mr. Langford, will you please take the stand?

MAXEY M. LANGFORD

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokar: Give us your full name.

(Testimony of Maxey M. Langford.)

The Witness: Maxey M. Langford, 404 Labor Temple.

Direct Examination

Q. (Mr. Walker) Portland, Oregon?

A. Portland, Oregon.

Q. Mr. Langford, are you connected with any labor organization? A. Yes.

Q. What organization?

A. The Retail Clerks' Union.

Q. In what capacity?

A. I am the International Representative.

Q. Were you such in October, November and December, 1940? A. I was.

Q. In such capacity, have you met with any representatives of the respondent here?

A. I have.

Q. When did you first meet with the respondent?

A. I can't give you the exact date on that; I believe it was during the month of August. [338]

Mr. Ball: Will it be agreed that it was August 30?

Mr. Walker: All right.

Q. (Mr. Walker, continuing) Whom did you meet with at that time? A. Mr. Barth.

Q. Anybody else?

A. I believe Mr. Denecke came into the office just before the meeting began, or during the meeting.

Q. And who was there representing the Union?

A. Mr. Dixon and myself.

(Testimony of Maxey M. Langford.)

Q. Where was that meeting held?

A. In Mr. Barth's office.

Q. What occurred?

A. Briefly, it was for the purpose of deciding who we were to meet with, and when we were to meet with them in order to negotiate a contract for the Retail Clerks people of Montgomery Ward.

Mr. Ball: I move to strike the answer of the witness relating to the purpose of the meeting as a conclusion of the witness.

Trial Examiner Bokat: Is there any dispute about it?

Mr. Ball: That might have been their purpose, but, as a matter of fact, the subjects discussed were not that.

Trial Examiner Bokat: All right, let him say what was said.

Q. (Mr. Walker, continuing). What was said?
[339]

A. At that time, we went into Mr. Barth's office, and Mr. Dixon said that he was desirous of negotiating a contract covering the sales people of the Portland plant of Montgomery Ward, and asked for information as to who would have the power to negotiate that contract and when we could meet with them.

Q. Were the questions answered?

A. They were.

Q. Who answered them? A. Mr. Barth.

Q. What did he say?

(Testimony of Maxey M. Langford.)

A. He said that he didn't have the power to negotiate such a contract, that that would be left up to Mr. Heidinger, who was at that time in the East.

Q. Were there any arrangements made concerning the time when the meetings could be held?

A. No.

Q. Did anything else take place there?

A. No.

Q. Did you meet again? A. Yes.

Q. When next? A. October 22.

Q. At the Heathman Hotel?

A. That is right.

Q. When you and Mr. Dixon and Mr. Hicks were present? [340] A. Yes.

Q. Who was present there for the company?

A. Mr. Barth and Mr. Powell.

Q. Will you relate what was said at that meeting?

A. There were so many things said, but it revolved mainly around the negotiating of a contract for the sales people, and the majority of the discussion took place there regarding the Union Shop clause.

Q. Did you say anything? A. Yes.

Q. What did you say at that time, if anything?

A. At that time, when the first clause had been read by Mr. Powell,—

Trial Examiner Bokar: You mean the proposed contract?

(Testimony of Maxey M. Langford.)

The Witness: The proposed contract, yes.

Trial Examiner Bokat: Board's Exhibit 7, I believe, Section 1. Is that the section referred to? Will you look at that exhibit?

The Witness: That is the one; Section 1.

Trial Examiner Bokat: All right.

Q. (Mr. Walker, continuing) Go ahead and state what you said at that time.

A. Mr. Powell stated that it would be impossible for the company to agree to that particular clause because it was contrary to the company policy. I then suggested that we might be [341] able to get together on a substitute clause to the effect that any of the people working in the plant at that time coming under the jurisdiction of the Retail Clerks' Union and who had filed applications for membership, were to remain members of the Union, and any new members coming into the plant would affiliate with the Union within 30 days; however, any people coming under the jurisdiction of the Retail Clerks who had not as yet filed application would not necessarily have to join the Union.

Trial Examiner Bokat: Did you have any discussion as to what employees were eligible for membership in the union; what classifications of employees?

The Witness: Not in detail.

Trial Examiner Bokat: You say "not in detail", but in general?

(Testimony of Maxey M. Langford.)

The Witness: There were some questions which were brought up about sign painters, supervisors, executives and so on.

Trial Examiner Bokat: What, if anything, did you state to Mr. Powell regarding the individuals that you just mentioned?

The Witness: That at that time so far as any questions regarding the eligibility of supervisors, or those in an executive capacity, I was satisfied that we could sit down with the company and straighten that out.

Mr. Ball: If we are going to save time, if they describe what was said instead of using these general descriptions, I think [342] we will accomplish our purpose. These general descriptions do not picture it accurately. They picture the minds of the witnesses, and do not give us the facts.

Trial Examiner Bokat: All right, let us have what the witness said concerning the classifications and types of employees named by the union in that conversation, if the conversation did take place.

The Witness: I am unable to give it word for word.

Trial Examiner Bokat: I understand that. Not necessarily word for word; give us the substance of it.

The Witness: Well, the substance of the conversation was that we claimed jurisdiction over everyone in the retail store engaged in the selling and

(Testimony of Maxey M. Langford.)

the handling of merchandise, outside of those in an executive capacity.

Q. (Mr. Walker, continuing) Did Mr. Powell reply to that? A. Yes.

Q. What did he say?

A. He said he was not in favor of that, because that was still a form of union shop clause, and because it was contrary to the company policy he would not be able to go for it.

Q. Did you say anything after that?

A. Several times after that I requested some sort of a substitute proposal for that particular clause.

Q. Was there any portion of Board's Exhibit No. 7 discussed at that time? [343]

A. Well, while I was present, no. I left before the meeting broke up.

Q. Was there any discussion concerning the Retail Clerks before the matter of the agreement was taken up?

A. Well, the meeting was opened in this manner: Mr. Powell had a letter that Mr. Dixon had written to him regarding the fact that we had a majority of the Retail Sales people in the plant.

Mr. Ball: I move to strike out what the letter said, or what the witness says the letter said.

Trial Examiner Bokar: Yes, the letter will speak for itself.

Mr. Ball: It takes no more time to be accurate, than it does to go into these generalities.

(Testimony of Maxey M. Langford.)

Trial Examiner Bokat: It is received in evidence as a Board's exhibit,—Board's Exhibit 6, I believe.

The Witness: Board's Exhibit 6?

Trial Examiner Bokat: Here is a copy of the letter. I assume you are referring to the letter of October 2, 1940. Is that the letter that you referred to (indicating)?

The Witness: Yes, that is the letter.

Trial Examiner Bokat: All right.

A. (Witness continuing) Mr. Powell had a copy of Board's Exhibit 6, and he said that they were willing to go ahead and discuss the contract, or discuss the propositions in the contract on the basis of that letter. [344]

Q. (Mr. Walker, continuing) Was anything else said, or did anything else take place at that meeting of October 22?

A. Not that I can recall.

Q. Did you meet with the company again after that? A. Yes.

Q. When was the next time?

A. December 13.

Q. Did you take part in that meeting?

A. Yes, I was present at the meeting.

Q. Was a form of Board's Exhibit 7 before all the parties at that meeting?

A. No; I don't believe that we had a copy of it at that time.

(Testimony of Maxey M. Langford.)

(Whereupon a document was marked as Board's Exhibit 10 for identification.)

Q. (Mr. Walker, continuing) I hand you what has been marked as Board's Exhibit 10 and ask you if you have seen a copy of that before?

A. Yes, I have.

Q. Will you state what that is?

A. That is a duplicate copy of Board's Exhibit 7.

Q. Whose handwriting appears on Board's Exhibit 10? A. Mine.

Q. When were the marking made on there?

A. On December 16.

Q. Now, let us go back to the meeting of the 13th. What took [345] place at the meeting of the 13th?

A. The majority of the meeting was devoted to a general discussion as to ways and means of getting together to settle the strike.

Trial Examiner Bokat: Will you repeat that, please?

(Thereupon the answer of the witness was read aloud as above recorded.)

Mr. Ball: I again move to strike that as an opinion and conclusion of the witness. Can't we get concisely what was said, and who said it, and when?

Trial Examiner Bokat: Strike it out.

Q. (Mr. Walker, continuing) Who else was present at the meeting of the 13th?

(Testimony of Maxey M. Langford.)

Trial Examiner Bokat: I don't believe there is any dispute as to who was present. I think that was covered before.

Mr. Ball: That is right.

Mr. Walker: I know, but I am asking, or going to ask, what each party said at the meeting.

Mr. Ball: You don't need to go over who was there. You can identify them one by one as to what was said.

Q. (Mr. Walker, continuing) Did you take any part in the discussions of the meeting of the 13th?

A. Some discussion in the meeting of the 13th?

Q. Yes. A. Yes, I took some part. [346]

Q. What did you state at the meeting?

A. I think that the first question that I asked during the meeting was a question that I asked of Mr. Powell.

Q. What was that?

A. I asked him, assuming that we would be able to get together on a contract that would be agreeable to both sides, would he have the power to sign such a contract.

Q. Did he answer? A. He did.

Q. What did he say?

A. He answered "no"; he said he didn't have such power.

Q. What had gone on preceding that, that prompted your question?

Mr. Ball: Let me make a record. I move to strike the answer out as to the answer given by Mr.

(Testimony of Maxey M. Langford.)

Powell, as being irrelevant. That applies to both the question and the answer.

Trial Examiner Bokat: I will deny the motion at this time. Is there a pending question?

Mr. Walker: Yes, there is. Will you read it, Mr. Nelson?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

Mr. Ball: Well, the same objection of irrelevancy to the subject matter.

Trial Examiner Bokat: I will have to overrule the objection. I don't know whether it is going to be material or not. I am [347] going to accept it subject to some connection with the issues.

A. What prompted me to ask that question was the fact that questions regarding different sections of the Warehousemen's contract, namely, Articles 1, 2 and 4, which had been discussed, and which were not acceptable, as to which counter proposals had been asked from the company; and at that time we had received no counter proposals.

Due to the fact that we were not receiving any definite answers, I wondered if we were dealing with anyone who had power to sign a contract if it was negotiated.

Mr. Ball: I move to strike that as an opinion and conclusion of the witness; and any statement that the witness might make as to what he thought certainly is not relevant to the issues and can have

(Testimony of Maxey M. Langford.)

not probative value. Let us get at the facts, and not generalities and conclusions and opinions of the witness concerning the state of mind of someone else, or concerning legal conclusions on matters which are subject to interpretation.

Trial Examiner Bokat: I will strike the part of the answer that has to do with the witness' mental operation, and the balance of the operation may stand.

Mr. Ball: I object for the further reason that any reference to a counter proposal and like statements involves questions of law, conclusions of law, and, as well, conclusions of fact.

Trial Examiner Bokat: I will have to overrule the objection. [348] I gather from the answer that someone had asked if the company was ready to make a counter proposal to the sections outlined by the witness; isn't that a fact?

The Witness: That is a fact.

Trial Examiner Bokat: Who had asked the question?

The Witness: Mr. Landye had asked the question, and also Mr. Estabrook.

Trial Examiner Bokat: Of whom?

The Witness: Mr. Powell.

Trial Examiner Bokat: What did Mr. Powell say, if anything?

The Witness: At that time, Mr. Powell stated that the company was not in a position and did not feel that he had anything to ask of the Union, and

(Testimony of Maxey M. Langford.)

as a result, at that time they didn't feel that they should make a counter proposal.

Mr. Ball: I move to strike the testimony about counter proposals, for the reason that that word has a legal significance, and the sense in which it is used is ambiguous, unless it is clearly shown that the meaning and intent of the term was clearly known to both the parties.

Trial Examiner Bokar: I was merely asking him if the term was used.

Mr. Ball: May I add the further reason for this motion, that the testimony that has been given on this subject is ambiguous, and it doesn't tend to prove or disprove any issue in the case. [349]

Trial Examiner Bokar: I will overrule the objection. Was the word "counter proposal" used by Mr. Landye when he asked the particular question of Mr. Powell?

The Witness: Yes.

Trial Examiner Bokar: That was the word that was used?

The Witness: Yes.

Mr. Ball: May it be understood that I have an objection to this entire line?

Trial Examiner Bokar: Yes, you may have an objection to this entire line of questions, Mr. Ball.

Mr. Ball: Thank you.

Q. (Mr. Walker, continuing) Did you attend the meeting of the 14th? A. Yes.

Q. Did you take any part in that meeting?

(Testimony of Maxey M. Langford.)

A. Very little part in the discussion at that time.

Q. What was it that you said?

A. I can't recall.

Q. About how long did the meeting last?

A. About 2 hours.

Q. Was Mr. Allen there at that time?

A. Yes, he was.

Q. Did Mr. Allen take any part in the meeting?

A. Yes, he did.

Q. Do you recall what he said? [350]

A. At one time during the meeting Mr. Allen asked Mr. Powell if the Company would be willing to sign a contract embodying the same hours, wages and working conditions for the striking employees that were in effect before the strike was called.

Mr. Ball: I move to strike the answer as being repetitions, having been gone over before, a number of times, and not the best evidence.

Trial Examiner Bokst: The motion is denied.

Q. (Mr. Walker, continuing) Was that question answered? A. It was.

Q. By whom? A. Mr. Powell.

Q. What did he say?

A. He said that they might consider it.

Q. Was anything further said on that matter?

A. I think that one of the company representatives, I believe Mr. Denecke, asked if that was the proposal of the union.

(Testimony of Maxey M. Langford.)

Q. Was that question answered?

A. It was.

Q. By whom? A. Mr. Allen.

Q. What was the answer? A. "No".

Q. Did you attend the meeting of the 16th?

A. Yes, I did. [351]

Q. Did you take any part in that meeting?

A. Yes, I did.

Q. Were copies of Board's Exhibit 7 before the persons present? A. Yes.

Q. Did you have a copy of it?

A. Yes, I did.

Q. What copy did you have beforehand?

A. Board's Exhibit 10.

Q. Will you refer to Board's Exhibit 3, please. Were copies of it before the persons present at that meeting? A. Yes.

Q. How did that meeting open up?

Trial Examiner Bokat: Before we get to that, was there any other contract present?

Mr. Walker. Yes, there was.

Trial Examiner Bokat: I will ask the question of the witness.

The Witness: Yes, there was.

Trial Examiner Bokat: What copies?

The Witness: The proposed contract of the office employees.

Trial Examiner Bokat: Now, I think that there is a pending question.

(Testimony of Maxey M. Langford.)

Mr. Allen: Let me ask for my information: has that Office Employees' contract been offered or identified as an exhibit?

Trial Examiner Bokat: Not yet.

Mr. Ball: Do you propose to do that? [352]

Mr. Walker: Yes.

Mr. Ball: That is what I wanted to know: if not, I want it in this record.

Trial Examiner Bokat: Is there a pending question?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

A. At that time, Mr. Ashe, the Federal Conciliator, suggested that we sit down at the table with the three different contracts and go down the contracts, clause by clause.

Q. Which agreement was taken up first?

A. The Warehousemen's agreement.

Q. Was there anything said concerning the relationship between the Warehousemen's agreement and the other contracts?

A. Not at that time; not that I can recall.

Q. Later on in that meeting? A. Yes.

Q. I see. Now, after the Warehousemen's contract was gone through, what next was taken up?

A. The Office Employees' contract.

Q. Was anything said about the Office Employees' contract?

A. Yes. I asked the question of Mr. Powell, with

(Testimony of Maxey M. Langford.)

regard to this contract, the same as I had asked him regarding the Warehousemen's contract.

Q. And what was that?

A. I asked Mr. Powell if there was at that time any clause or [353] clauses in the Office Employees' contract that would be acceptable to the company, without change or revision in any form whatsoever.

Q. Did he answer that? A. He did.

Q. What did he say?

A. He said there were no such clauses.

Trial Examiner Bokat: Which contract was that?

The Witness: The Office Employees.

Q. (Mr. Walker, continuing) After the Office Employees' contract was taken up, what next was taken up?

A. The Retail Clerks' contract.

Q. Was there anything said about the Retail Clerks' contract?

A. I asked Mr. Powell the same question regarding the Retail Clerks' contract.

Q. That is, the same question that you had asked Mr. Powell regarding the Office Employees' contract? A. Yes.

Q. Did he answer that, regarding the Retail Clerks' contract? A. Yes.

Q. What did he say?

A. He said there were a few clauses that he believed the company could accept, and one or two

(Testimony of Maxey M. Langford.)

that might be acceptable with one or two minor changes.

Q. Then what did you do? [354]

A. We went down the contract, clause by clause, eliminating from the discussion the clauses that were acceptable to the company. That is, we eliminated any discussion on them after we found out that they were acceptable.

Q. When the clauses which were acceptable were ascertained, what did you do?

A. I made notations on the margin of the contract.

Trial Examiner Bokar: Then and there?

The Witness: How is that?

Trial Examiner Bokar: Then and there?

The Witness: Then and there, yes.

Q. (Mr. Walker, continuing) And then you went through the agreement, clause by clause?

A. That is right.

Q. What discussion was there,——

Mr. Ball: This is the Clerks' contract, that is, Board's Exhibit 7, isn't it?

Trial Examiner Bokar: The Retail Clerks' contract is Board's Exhibit 7 and the Warehousemen's contract is Board's exhibit 3. The Office Employees' contract has not yet been offered.

Q. (Mr. Walker, continuing) Was there anything said regarding section 1? A. Yes.

Q. What was the discussion at that time? [355]

(Testimony of Maxey M. Langford.)

A. That the company would not accept any form of union shop contract.

Q. Who said that? A. Mr. Powell.

Q. What happened after that? What was said?

A. We went on to the next paragraph.

Q. Section 2? A. That is correct.

Q. Was there any discussion on it?

A. Very little.

Q. What was said?

A. Mr. Powell stated that there would have to be some changes made in that particular clause before it would be acceptable.

Trial Examiner Bokat: Did he indicate what changes?

The Witness: No, he didn't.

Q. (Mr. Walker, continuing) What did the representatives of 1257 say to that, if anything?

A. Nothing.

Q. What did you do then?

A. We went on to the next paragraph.

Q. Section 3? A. Section 3.

Q. Was there any discussion on it?

A. A little.

Q. What was said? [356]

A. Mr. Powell stated that the company could not go for that, as it was written.

Q. Did he indicate what part of it was not acceptable? A. Not that I can recall.

Q. Did any of the representatives of 1257 say anything to that? A. No.

(Testimony of Maxey M. Langford.)

Q. Then what did you do?

A. We went on to Section 4.

Q. Was there any discussion on it?

A. There was.

Q. What was it?

A. Mr. Powell stated that if Armistice Day was stricken out of the proposed holidays, and Thanksgiving Day substituted, he believed the Company would accept the clause.

Mr. Ball: Just a moment. May we go off the record?

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Trial Examiner Bokat: Will you read the last question, Mr. Reporter?

(Thereupon the last question was read by the reporter as above recorded.)

Trial Examiner Bokat: May I state for the record that Board's Exhibit 7 includes both Armistice Day and Thanksgiving Day; I don't understand the answer of the witness, and I will ask him [357] to look at Board's Exhibit 3 and Board's Exhibit 7.

The Witness: It is possible the typist made a mistake.

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Trial Examiner Bokat: Now, have you any explanation to make of that, Mr. Langford?

The Witness: I have examined it, and the only

(Testimony of Maxey M. Langford.)

way that I can explain is that the typist who made up the copies omitted in Board's Exhibit No. 10 the holiday section.

Trial Examiner Bokat: The holiday section is not included in Section 4 of the copy which you have?

The Witness: That is right.

Trial Examiner Bokat: I understand that the copy that Mr. Ball has does have Thanksgiving, and does exclude Armistice Day. Is that correct?

Mr. Ball: That is correct.

Trial Examiner Bokat: When the Company said that if the Union would agree to substituting Thanksgiving for Armistice Day, the clause would be acceptable, what did the Union say? First, am I correct in understanding that the company said they would accept the clause, if that substitution was made?

The Witness: Yes.

Trial Examiner Bokat: What did the Union reply to that?

The Witness: I don't remember any particular reply.

Trial Examiner Bokat: No particular objection or suggestion? [358]

The Witness: No.

Q. (Mr. Walker, continuing) What did you do next? A. We went on to Section 5.

Q. Was there any discussion on it?

A. Some, at that time.

(Testimony of Maxey M. Langford.)

Q. What was said?

A. That the company would be unable to recognize seniority.

Q. Any reasons given?

A. Contrary to their company policy.

Q. Who said that?

A. I believe Mr. Powell and Mr. Huddleston, both.

Q. Both of them made that statement?

A. I believe so, yes.

Q. Did 1257 say anything to that?

A. Not at that time, no.

Q. Then what did you do?

A. We went on to Section 6.

Q. Was there any discussion on it?

A. Mr. Powell stated that the company would be unable to accept that.

Q. Did he indicate any reason?

A. Not that I recall.

Q. What did 1257 do after that?

A. We went on to Section 7.

Q. Was there any discussion on that? [359]

A. No particular discussion that I can recall.

Q. Did any of the representatives of Montgomery Ward & Company state whether or not that was acceptable?

Mr. Ball: Just a minute. Will you read the question?

(Thereupon the pending question was read aloud by the reporter as above recorded.)

(Testimony of Maxey M. Langford.)

A. If I remember correctly, I believe Mr. Powell stated that they were abiding by the Wagner Act on that particular clause.

Trial Examiner Bokat: Was there any objection to the clause remaining as it was?

The Witness: Not that I recall, offhand.

Trial Examiner Bokat: All right; let's go to the next one.

Q. (Mr. Walker, continuing) What did Local 1257 say to Mr. Powell's statement?

A. Nothing that I can recall.

Q. Was there any discussion on Section 8?

A. Yes.

Q. What was it?

A. Mr. Powell stated that the company would be unable to accept that, due to the fact that they didn't want any union representative talking to their people while they were working on their jobs.

Q. Did 1257 say anything to that?

A. Not that I can remember.

Q. Then what did you do? [360]

A. We went on to the next clause, Section 9.

Q. Just one thing more. Did Mr. Powell say anything further after he had indicated the company's position respecting Section 8?

A. Not that I can recall.

Q. All right. Was there any discussion on Section 9? A. Yes.

Q. What was it?

(Testimony of Maxey M. Langford.)

A. Mr. Powell stated that that was not acceptable.

Q. Did he give any reason?

A. Not that I can remember.

Q. And then what did you do?

A. We went on to Section 10.

Q. Was there any discussion on it?

A. Very little discussion on the majority of it, or on the majority of the rest of the clauses.

Q. Well, on Section 10, what was said about it?

A. There was very little discussion on it.

Q. Well, was it agreeable or was it not?

A. It was not acceptable to the company.

Q. It was not? A. No.

Q. Then what did you do?

A. We went on to Section 11.

Q. Was there any discussion on it? [361]

A. Well, it was not acceptable to the company.

Q. Who said that? A. Mr. Powell.

Q. Any reason given? A. No.

Q. Then what did you do?

A. We went on to Section 12.

Q. Was there any discussion on it?

A. Merely that it was not acceptable to the company.

Q. Who said that? A. Mr. Powell.

Q. Any reason given?

A. Not that I can recall.

Q. Then you took up Section 13?

A. That is correct.

(Testimony of Maxey M. Langford.)

Q. What was said about it?

A. Mr. Powell stated that with the substitution of the word "six" and "6" for the "5", which was written into the section, he believed that it would be acceptable to the company.

Q. Did 1257 say anything to that?

A. Not that I can recall.

Q. Was there any discussion on Section 14?

A. Mr. Powell stated that that would be unacceptable to the company.

Q. Any reason given? [362]

A. Not that I can recall.

Q. Then what happened?

A. We went on to Section 15.

Q. Was there any discussion on it?

A. Yes.

Q. What was said?

A. Mr. Powell said that would be acceptable to the company.

Q. And then you went on to Section 16?

A. Yes.

Q. What was said about that?

A. He said it would be unacceptable to the company.

Trial Examiner Bokar: Off the record.

(Discussion off the record)

Q. (Mr. Walker, continuing) Was there any discussion on Section 15? A. Yes.

Q. What was it?

(Testimony of Maxey M. Langford.)

A. He stated that the clause would not be acceptable to the company.

Q. Any reason given?

A. If I remember correctly, his objection was as to the Adjustment Board as set up in Section 16.

Q. Did he give any reason for his objection to the Adjustment Board?

A. If my memory serves me correctly, Mr. Hudleston stated that [363] he thought that the company should have the final and sole word regarding the discharge of employees.

Q. Was there anything else said about Section 16, on the Adjustment Board matter?

A. Not at that time.

Q. Then what did you do?

A. We went to Section 17.

Q. What did you do about that?

A. Mr. Powell stated that that would be acceptable to the company.

Q. And then you passed on to Section 18?

A. That is right.

Q. Was there any discussion on that?

A. Yes, sir.

Q. What was the result of the discussion, or what was the discussion?

A. Mr. Powell stated that he could not accept it.

Q. Any reason given? A. No.

Q. What did you do?

A. We went on to Section 19.

(Testimony of Maxey M. Langford.)

Q. Was that acceptable or unacceptable?

A. That was acceptable.

Q. And then you went to Section 20?

A. That is correct.

Q. What took place on Section 20? [364]

A. That was another clause that was not acceptable.

Q. For what reason, if any?

A. Not that I can remember; I can't remember any.

Q. And then you went to Section 21?

A. That is correct.

Q. And what about it?

A. It was another section that was not acceptable.

Q. For what reason?

A. None that I can remember.

Q. What was said about Section 22?

A. I don't remember.

Q. I beg your pardon?

A. I don't remember. I don't recall any particular discussion on that clause.

Q. And then you took up Section 23?

A. That is correct.

Q. What occurred while discussing it?

A. I don't remember; frankly, I don't remember much more discussion on that one, or the next one.

Q. On either 23 or 24?

A. That is correct.

Q. Was there any discussion on Section 25?

(Testimony of Maxey M. Langford.)

A. Some, yes.

Q. What was it?

A. That is another clause that was not acceptable to the company.

Q. Any reason given? [365]

A. None that I remember.

Trial Examiner Bokat: May I direct your attention to sections 23 and 24. Even though you don't recall any discussion, do you know whether those clauses were acceptable to the company?

The Witness: The reason I don't know is because I was talking to another party during the course of the discussion of those clauses in another part of the room.

Trial Examiner Bokat: So you made no notation?

The Witness: That is right.

Trial Examiner Bokat: As to whether or not the company was willing to accept them?

The Witness: That is right.

Trial Examiner Bokat: That would apply to Section 22, as well?

The Witness: That is right.

Trial Examiner Bokat: All right, proceed.

Q. (Mr. Walker) What was the discussion on Section 26?

A. I don't remember any particular discussion.

Q. Was it acceptable or not?

A. As a whole, if I remember correctly, that was not acceptable.

(Testimony of Maxey M. Langford.)

Q. Any reason given?

A. No, not that I recall.

Q. What about Section 27?

A. That clause was not acceptable to the company. [366]

Q. Any reason given?

A. Not that I can recall.

Q. What about Section 28?

A. Section 28 was acceptable to the company.

Q. And then you took up section 29?

A. That is correct.

Q. What was said about it?

A. That clause was not acceptable to the company.

Q. What was the reason given, if any?

A. None that I remember.

Q. What about Section 30?

A. I believe that we discussed sections 30 and 31 together.

Q. What was said concerning sections 30 and 31?

A. Regarding Sections 30 and 31, Mr. Powell stated that the company would not grant any increase in wages.

Q. Any reason given?

A. Not at that time, no.

Q. Did 1257 say anything to that?

A. I can't recall that we did, no.

Q. Did you take up section 32 next?

(Testimony of Maxey M. Langford.)

A. Yes, we did. The same thing applied to Section 32 as did to Sections 30 and 31.

Q. So you passed over that to Section 33?

A. Yes.

Q. On sections 30 and 31, you stated that Mr. Powell said that [367] the company could not grant any increase in wages? A. That is correct.

Q. And you also stated that your answer respecting Section 31 also applied to Section 32?

A. That is correct.

Q. Will you explain that?

A. That the company would not grant any increase in wages for the people classified in Section 32.

Q. Now, what about Section 33?

A. Mr. Powell stated that the company would not grant any increase in pay to any persons that would be covered by that section.

Q. Did Mr. Powell give any reason?

A. No.

Q. Did 1257 say anything to that? A. No.

Q. Then what did you do?

A. We went on to Section 34.

Q. What was said about that?

A. The company would not grant any increase in pay to any employee covered by that section.

Q. Mr. Langford, will you examine sections 35, 36 and 37, and 38. Now, with respect to sections 35, 36 and 37, what was the position of the company?

(Testimony of Maxey M. Langford.)

A. The position of the company was still the same. [368]

Q. What was that?

A. That they would not grant any increase in pay.

Trial Examiner Bokar: We will take a ten minute recess at this time.

(Whereupon, at this time a short recess was taken, after which proceedings were resumed as follows:)

Trial Examiner Bokar: The hearing is now in session.

Q. (Mr. Walker, continuing) Now, with respect to Section 38, what took place on that?

A. I don't recall any particular discussion on paragraph A of Section 38.

Q. Was it acceptable or not?

A. I can't recall that it was.

Q. What about Section B?

A. That was not acceptable to the company.

Q. Any reason given?

A. The reason given was that the company was not going to grant any increase in pay.

Q. What about Section 39?

A. Section 39 was not acceptable to the company.

Q. What was the reason given, if any?

A. That the company was not in favor of an arbitration board.

(Testimony of Maxey M. Langford.)

Q. Did they give any reason why?

A. The reason why was that they wanted to have the final word in case a dispute arose. [369]

Q. Who said that? A. Mr. Huddleston.

Q. Did 1257 say anything further?

A. Not that I recall.

Q. Was Section 40 discussed?

A. I don't recall any particular discussion on Section 40.

Q. Was that acceptable or not?

A. I don't remember.

Q. Was 41 taken up?

A. I believe that it was.

Q. Was anything said about it?

A. Not that I recall.

Q. After the agreement had been gone through, what next occurred at the meeting of the 16th?

A. The meeting broke up immediately afterwards.

Q. Was anything said by anybody just before it broke up?

A. Mr. Ashe of the Federal Labor Bureau made the statement that he would have to make some sort of a report to his office in Washington; and, also, that he had to have a statement for the press, and that he wanted to clarify in his own mind some of the major objections towards the proposed contract. Mr. Ashe made notes to the effect that the company would not agree to any form of union shop clause.

(Testimony of Maxey M. Langford.)

that they would not recognize seniority, that they would not grant any increases in pay, and that they refused to accept any form of arbitration unless they [370] were granted the right of having the final word on such arbitration.

Q. How do you know that took place?

A. I saw Mr. Ashe take the notes, and I heard the questions asked of Mr. Huddleston.

Q. I don't quite understand you. What questions did he ask of Mr. Powell and Mr. Huddleston?

A. He asked Mr. Powell and Mr. Huddleston if they would recognize any form of union shop clause.

Q. Was that question answered? A. Yes.

Q. What was the answer to it?

A. The answer was "no".

Q. What next did Mr. Ashe ask?

A. He asked if the company would recognize seniority rights.

Q. Was that question answered?

A. After considerable discussion, yes, it was answered.

Q. What was the answer?

A. The answer was "no".

Q. What was the discussion that preceded the negative answer?

A. Trying to qualify what seniority was, or to clarify it.

Q. Can you relate what was said in that regard by Mr. Powell and Mr. Huddleston?

(Testimony of Maxey M. Langford.)

A. Mr. Powell and Mr. Huddleston both stated that there were too many other things, such as marital status, adaptability, [371] promotability, and so on, to be considered before seniority could enter into the picture. [372]

Q. (Mr. Walker continuing) Were any other questions asked of Mr. Ashe?

A. Mr. Ashe asked the company representatives if the company would grant any increases in pay.

Q. Was that question answered?

A. It was.

Q. What was the answer?

A. The answer was, No.

Q. What next did Mr. Ashe ask?

A. Mr. Ashe asked if the company would agree to any form of arbitration or adjustment board?

Q. And was that question answered?

A. That question was answered, yes.

Q. Who answered it?

A. Mr. Powell, or Mr. Huddleston.

Q. What was the answer?

A. The answer was, No.

Q. Now, after those questions were propounded by Mr. Ashe, what next took place?

A. Mr. Ashe made the statement that he was going to leave for San Francisco, and he could see no further reason for holding any more meetings in Portland because he didn't feel the company was dealing in good faith.

(Testimony of Maxey M. Langford.)

Mr. Ball: Just a minute. The testimony of what Mr. Ashe expressed as his opinion about the company should be stricken [373] as an opinion and conclusion of Mr. Ashe.

Trial Examiner Bokat: Yes.

Mr. Walker: Well, Mr. Examiner, I submit that Mr. Ashe,—as his title indicates,—is a person possessing experience, and is an expert; and if he made such a statement at the meeting in the presence of the respondent,——

Trial Examiner Bokat: Do you expect me to be bound by what Mr. Ashe's opinion was, or am I to be bound by my own opinion?

Mr. Walker: I know that Mr. Ashe's opinion is not a matter upon which a finding could be predicated.

Trial Examiner Bokat: That is the very reason I am sustaining the objection.

Mr. Walker: I submit it has some probative value to be taken and weighed in consideration with all the other factors.

Trial Examiner Bokat: I think you make the point, Mr. Walker; but I am going to sustain the objection.

Mr. Ball: I might add to the objection, that it is also hearsay.

Trial Examiner Bokat: Well, something that was said in the presence of all the parties, I don't see how it possibly could be hearsay.

(Testimony of Maxey M. Langford.)

Q. (Mr. Walker continuing) After making that statement, what did Mr. Ashe do?

A. The meeting broke up immediately following that. [374]

Mr. Ball: Well, I move to strike that, "after making that statement", because that refers to a statement which, in itself, has been stricken from the record.

Trial Examiner Bokar: That is not physically stricken. Well, the meeting broke up subsequently?

The Witness: That is correct.

Q. (Mr. Walker continuing) Did any of the representatives of the respondent say anything further to Mr. Ashe before he left the room?

A. Not that I can remember.

Mr. Walker: That is all.

Trial Examiner Bokar: Any questions, Mr. Landye?

Mr. Landye: No questions.

Trial Examiner Bokar: Proceed, Mr. Ball.

Cross Examination

Q. (Mr. Ball) Going back, Mr. Dixon, to the meeting of August 30th. You recall, do you not, in addition to the matters that you testified to as occurring at that meeting, that a question was raised as to appropriate unit?

A. For the sake of the record, Mr. Ball, my name is Langford. You called me Dixon.

Mr. Ball: I beg your pardon, Mr. Langford.

(Testimony of Maxey M. Langford.)

A. I don't recall any discussion of the appropriate unit at that time, no.

Q. When you say you don't recall the fact, you have no definite [375] recollection that such did not take place? A. No.

Q. Then the next meeting that you recall is the meeting of October 22nd?

A. That is correct.

Q. You recall that Mr. Powell, at the beginning of that meeting, asked for the exact percentage of the number of employees that the two unions there present had signed up?

A. I believe he asked that question, yes.

Q. And that those figures were given by Mr. Hicks and Mr. Dixon?

A. I believe they gave those figures, yes.

Q. You also recall that Mr. Dixon stated, at that meeting, with regard to Section 1, that it was a very important clause because there had been insistence on the part of the conference in Cleveland the previous summer that that be included in all contracts?

A. I believe Mr. Dixon made the statement, yes.

Q. As a matter of fact, that clause is included in a large number of contracts you have in the Portland area? A. That is true.

Q. Do you recall how many contracts you have that include that clause here?

A. In the Portland area all of our contracts contain that clause. [376]



United States
Circuit Court of Appeals

For the Ninth Circuit. 2

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONTGOMERY WARD & COMPANY,
Respondent.

MONTGOMERY WARD & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

In Two Volumes

VOLUME II

Pages 499 to 910

FILED

JUN 9 - 1942

Upon Petition for Enforcement and Upon Petition
for Review of An Order of the National
Labor Relations Board

PAUL P. O'BRIEN,
CLERK

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(Testimony of Maxey M. Langford.)

Q. The statement was made that you could not make another contract without including that clause, in fairness to the parties who were parties to those contracts? A. That is correct.

Q. Trial Examiner Bokar: The other contracts that you have in the Portland area cover the same types of employees, or classifications of employees, as set forth in the contract, Board's Exhibit 7?

The Witness: That is correct.

Q. (Mr. Ball continuing) Now, as a matter of fact, in defining the employees coming under your jurisdiction, you find in many cases, an employee in a store such as Montgomery Ward may do part selling and part work that belongs in the jurisdiction of some other craft.

A. That might be the case out there, yes.

Q. You do run across the situation?

A. Occasionally, yes, we do.

Q. Well, as far as you know, for example, the linoleum layers might also be employed selling linoleum at Ward's?

A. I don't have any reason to believe to the contrary at all.

Q. Did you have any occasion to discuss with Mr. Dixon his telephone call with Mr. Powell on October 23rd?

A. I don't believe that we discussed it. If I remember correctly, Mr. Dixon told me he had talked to Mr. Powell on the 'phone, and was intending to meet Mr. Powell in California, [377] subsequent to that 'phone call.

(Testimony of Maxey M. Langford.)

Q. Turning now to the meeting of December 13th, or, rather, the meeting of December 16th, where this contract was discussed. When you say that no reasons were advanced by the company for their disagreement with certain sections, you don't mean to imply that you asked them, at that time, to state the reasons? A. No, I didn't.

Q. The fact is, what you were trying to do was to offer this contract and find the clauses which were acceptable? That was one of the reasons?

A. At that time, yes.

Q. There had been, at other times, a rather full discussion of a good many of these points?

A. Number of them, yes.

Q. As to the matter, for example, of wages; you had heard the statement made it was a company policy to pay as much or more in the community as was being paid elsewhere?

A. Yes, I heard the statement made.

Mr. Ball: I think that is all.

Trial Examiner Bokat: Redirect, Mr. Walker?

Redirect Examination

Q. (Mr. Walker) What figures did Mr. Hicks and Mr. Dixon give concerning majority representation at the meeting of October 22nd? [378]

A. Mr. Dixon, at that time, stated he had between eighty-five and ninety per cent of the people coming under the jurisdiction of his union signed up as members. Mr. Hicks made the statement he had between sixty and sixty-five per cent.

(Testimony of Maxey M. Langford.)

Q. Was there any further discussion concerning the extent of majority representation?

A. Not that I can remember.

Q. After going over the contract at the meeting of December 16th, did Local 1257 request anything further of the company?

A. We requested, at that time, as we had done prior to the 16th, a written counter proposal from the company.

Mr. Ball: Now, just a minute. I object to the question and move to strike the answer unless a date is set specifically.

Trial Examiner Bokar: He said December 16th. Read the question and answer, Mr. Reporter.

(Whereupon the question and answer referred to were read aloud by the reporter as above indicated.)

Mr. Ball: I move to strike that out as involving an opinion and conclusion involving ambiguous language. The witness should be instructed to state exactly what was said.

Trial Examiner Bokar: I will let it stand, subject to further clarification. The witness can state exactly what was said. What was said on that occasion?

The Witness:; If I may explain, Mr. Examiner, on the 13th, 14th, and 16th the Retail Clerks representatives asked the com- [379] pany to submit a counter proposal on the contract that had been given to the company.

(Testimony of Maxey M. Langford.)

Trial Examiner Bokat: Who asked?

The Witness: Mr. Dixon, myself, and Mr. Landye.

Trial Examiner Bokat: You asked it of Mr. Powell?

The Witness: Of Mr. Powell, yes.

Trial Examiner Bokat: What was the reply, if any?

The Witness: Mr. Powell stated that the company did not feel that they had anything to ask of the union.

Mr. Ball: It is understood I have again, to this line of inquiry, the same general objection which I expressed?

Trial Examiner Bokat: Yes. The record may so show.

Q. (Mr. Walker continuing) Was such ever received?

A. We have never received a written counter proposal from the company.

Mr. Ball: The same objection to that question and answer.

Trial Examiner Bokat: Yes. I will let it stand.

Mr. Walker: That is all.

Mr. Ball: That is all.

Trial Examiner Bokat: Witness excused.

(Witness excused)

Mr. Walker: If the Examiner please, I would like to request permission to produce Mr. Landye as a witness.

Mr. Ball: To such, respondent strenuously objects. Mr. Landye appears as counsel in the case, and if they follow the [380] rules of ethics and of orderly procedure, Mr. Landye should not appear in the dual capacity of representing his client as an advocate and assisting his client's case by getting up and testifying. The testimony shows that prior to the meeting of December 13th, Mr. Landye had already consulted with Mr. Estabrook, at least, in the formation of charges against this company. If counsel, under the circumstances, acts as both witness and counsel in the prosecution of those charges, it is a denial to this company of due process of law, a breach of professional ethics, and something this Examiner, in its discretion, should not permit.

Mr. Landye: If the Court please,—

Trial Examiner Bokar: I am ready to make my ruling; but if there is something you want to say,—

Mr. Landye: No. That is all right.

Trial Examiner Bokar: I don't see where I have any discretion to prevent Mr. Landye from taking the stand, if he so desires, and the Board desires to call him as a witness. I will have to overrule the objection. [381]

JAMES LANDYE

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: James Landye, 1003 Corbett Building, Portland.

Q. (Mr. Walker) What is your occupation?

A. Attorney.

Q. How long have you been an attorney?

A. 1934.

Q. To the bars of what states are you admitted and licensed to practice?

A. Well, California, Oregon, and Washington; all three. And when I stated 1934, I meant that was Oregon. The first one.

Q. Prior to admission to State of Oregon, what experience had you had?

A. Restate the question please.

Trial Examiner Bokat: Read it back. Is it necessary to go into the qualifications of Mr. Landye?

Mr. Walker: I just have one point on his qualifications.

Trial Examiner Bokat: All right. Read the question now to Mr. Landye, please.

(Whereupon the question referred to was read aloud by the reporter as above recorded.)

(Testimony of James Landye.)

A. Well, none in particular, Mr. Walker. I had been a member of a labor union, but no particular experience prior to my admission.

Q. Are you associated with the Pacific Coast Labor Bureau?

A. I was, from 1935 until the fall of '38.

Q. What was the nature of your work with the Pacific Coast Labor Bureau?

A. Negotiations and arbitrations for labor unions.

Mr. Ball: Let the record show that the respondent objects to this line of questioning of what Mr. Estabrook did. Object to it as irrelevant and immaterial.

Trial Examiner Bokar: Mr. Landye, you mean?

Mr. Ball: Mr. Landye, yes.

Trial Examiner Bokar: I don't know. I will have to let it stand at this time, subject to some connection.

Q. (Mr. Walker continuing) How long had you been so engaged with the Pacific Coast Labor Bureau?

A. From March of 1935 to October, 1938.

Mr. Ball: I assume my objection goes to this entire line?

Trial Examiner Bokar: Yes. I assume the purpose is to show Mr. Landye is an experienced negotiator in negotiating contracts?

Mr. Ball: Well, let the record show, if that be the purpose, we object to any testimony to qualify

(Testimony of James Landye.)

Mr. Landye as any expert. This is not a case calling for expert opinion.

Trial Examiner Bokar: I don't know whether he is going to [383] be called upon to give any opinion or not. Am I correct in that assumption?

Mr. Walker: I may say, I am not asking him to express an opinion.

Trial Examiner Bokar: Am I correct in the assumption that the purpose is to show he has had experience in negotiations?

Mr. Walker: Yes.

Trial Examiner Bokar: All right.

Q. (Mr. Walker continuing) During that period of time, what organizations did you represent in negotiations or arbitration?

Trial Examiner Bokar: Do you really have to go into all that?

The Witness: I couldn't answer that, Mr. Walker. It has been several hundred. I couldn't name them. Hundreds of them.

Trial Examiner Bokar: I am not interested in a list.

The Witness: It would take me too long to recall them.

Q. (Mr. Walker continuing) Have they all been negotiations between labor organizations and employers? A. All of them, yes.

Q. Approximately how many negotiations have you conducted?

(Testimony of James Landye.)

A. I can't answer that question. I can remember twenty-eight in one month; but I can't remember over three and a half years how many hundreds.

Trial Examiner Bokar: You say it ran into the hundreds?

The Witness: Yes. [384]

Trial Examiner Bokar: All right.

Q. (Mr. Walker continuing) Have you had occasion to meet with any of the representatives of Montgomery Ward? A. Yes, I have.

Q. And when did you first meet with them?

A. I first met with them either in April or May, 1940, on the original Warehousemen's case. That was my first experience with Montgomery Ward.

Q. That is the representation meeting?

A. Yes, for the Warehousemen.

Q. Board's Exhibit 2? A. Yes.

Q. Was the record of it? A. Yes.

Q. Subsequent to that, did you have occasion to meet with any of the representatives of respondent?

A. Yes, I did.

Q. When was the next time?

A. Approximately September 19, 1940.

Q. Where was that meeting?

A. In the Heathman Hotel.

Q. You met with whom there?

A. Mr. Powell and Mr. Barth and Mr. James Barr.

Q. Did anyone accompany you?

(Testimony of James Landye.)

A. Mr. Dixon. [385]

Q. Will you relate what occurred at that meeting.

(Off the record discussion.)

A. Mr. Dixon and myself went into the hotel room, and the three gentlemen from the company were there. I met Mr. Powell for the first time, and Mr. Barr. Mr. Barr stated that Mr. Powell would speak for the company. We started then to discuss the terms of the contract.

Q. Board's Exhibit 7?

A. Yes. Mr. Powell asked us exactly who we represented. Mr. Dixon told him that we represented the Retail Clerks. Mr. Powell stated that he didn't want to deal just with the Retail Clerks alone; he wanted to deal with the office workers as well as the Retail Clerks, in the retail unit. Mr. Dixon explained to Mr. Powell that he only had jurisdiction over the Retail Clerks,—which he said was an International Union; that the Office Workers had jurisdiction over the office workers in the retail side, as well as jurisdiction over the office workers on the mail order side. Mr. Dixon stated that he had no power to deal for the office workers. I stated about the same thing. Mr. Powell then told us that the company set-up was such that the retail side and the mail order side had different heads within their company. He said that one was directed from Chicago and one from Oakland, I believe; and that it was more convenient for the company to deal on

(Testimony of James Landye.)

the retail side; and that he wanted to deal with just one union for all the employees on [386] the retail side. Mr. Dixon told him again that that was impossible; that he did not represent the office workers. We started discussion of Section 1, and Mr. Powell stated that they would not grant the union shop; and then he stated again that the company wanted to deal with one union for all the employees on the retail side. At that point I told Mr. Powell that there would be no use us discussing the whole contract, or any other parts of it, until we found out if the company would recognize the fact that the Retail Clerks had a majority of the retail clerks; and that the company would deal with us as such, for the retail clerks. He stated,—Mr. Powell,—that he didn't want to deal with a union when he wasn't sure they had the majority. I asked him if there was any question that the Retail Clerks had a majority, and he said he was not saying they didn't and he was not saying they did. I asked him if the letter, which we had previously sent, was not sufficient; and he said he wasn't saying whether it was or whether it wasn't. I then suggested, in order to clear up the whole matter, three separate methods by which we might straighten it out. One was to take our letter of August as protection for the company,—I think is the way I put it. Second, was to have a check-off of the books of our membership in the Retail Clerks with the retail clerks of the company showing on their payroll. That could either

(Testimony of James Landye.)

be done, I told them, by either a National Labor Relations Board Field Examiner, or anyone else [387] as far as we were concerned. Any auditor. Or, that we have an election, a consent election, whereby we would agree on the payroll of the retail clerks and have an election any place to determine it that way.

Q. Did Mr. Powell respond to any of the three suggestions?

A. He said that he couldn't answer the question at that time. I asked him if he wouldn't let us know within two or three days. I finally asked him if he would let us know by the next Monday,—I forget what September 19th was,—I asked him if he would let us have it by the next Monday—I remember that,—and he said he would. Then we got back to the question of the contract. I asked Mr. Powell the question,—so that we would be clear on the whole things,—I asked him, “Assume that we agree on every section of the contract, would the company consent to sign an agreement with us?” Because, I told him, I was disturbed over the statement as to whether they recognized us or not. And he said he couldn't give the answer to that question; that he thought we should go ahead and negotiate and leave the question as to whether an agreement could be signed or not until we got through. I told him that we couldn't do that, because if the membership ever found out that we had negotiated a contract

(Testimony of James Landye.)

for two or three weeks and then the company refused to sign it and raised the question of recognition, probably Mr. Dixon and myself would both be out of jobs. I told him I couldn't understand the company coming [388] to a meeting without having a definite position on the question of recognition. I think that about concluded that meeting. We left with the company telling us they would let us know by the next Monday,—let Mr. Dixon know, not myself.

Q. Did you hear from Mr. Powell after that?

A. Not in regard to the Retail Clerks. I didn't ask Mr. Powell to call me; I told him to call Mr. Dixon.

Q. After that, did you meet with any of the respondent's representatives?

A. Yes; December 13th.

Trial Examiner Bokar: You were present at all three of those meetings?

The Witness: No, I was not. I was ill after December 13th and I went home.

Trial Examiner Bokar: Just the December 13th meeting?

The Witness: Just the December 13th meeting.

Q. (Mr. Walker continuing) Were you at the meeting of October 22nd? A. No.

Q. Now, what took place at the meeting of December 13th?

A. Mr. Brady opened that meeting, the President of the Central Labor Council. Mr. Brady stated

(Testimony of James Landye.)

that a request had come in to put Montgomery Ward on the unfair list. He stated that he,—Mr. Brady,—Mr. Anderson, Secretary of the Council, and one other member of the Executive Board, had met with Montgomery [389] Ward two or three days previous to December 13th to see if they could get the parties together, and that as a result of that meeting, they had asked to have Mr. Powell come up from Oakland, and that this was the result of their conversations,—this meeting Mr. Brady opened. Mr. Estabrook then spoke and discussed the question of the union shop. It was discussed back and forth.

Q. What was said concerning that? Just one minute. You are referring now to Article 2 of Board's Exhibit 3. Is that correct?

A. Yes. I didn't have the agreement in front of me at the time, myself, but I knew what it was. That is what they were discussing.

Q. How did the discussion relative to Article 2 begin?

A. Mr. Estabrook, I believe, pointed out, or said, that they wanted that included in their contract. Mr. Powell said that that was,—the company would not enter into any agreement whereby they told the employees whether or not they should belong to a union. I, at that time, told Mr. Powell it is impossible, to have industrial relations, for a company to have half and half; and that for better industrial relations, we had found by experience, it was best

(Testimony of James Landye.)

to have them all in the union. And Mr. Brady spoke about along the same lines.

Q. What was the result of the discussion concerning Article 2?

A. Mr. Powell refused the section.

Q. What did he say about it? I mean, did he say anything further than that which you have related?

A. That was just the general effect of it.

Q. What next occurred at the meeting?

A. Mr. Ashe asked if the company had all the proposals of the unions before them. Mr. Powell said, "Yes", except they did not have the Office Workers; and I said that we would see that was gotten in there that afternoon or the next day.

Trial Examiner Bokar: May I have that answer and question, please?

(Whereupon the last question and answer were read aloud by the reporter as above recorded.)

Trial Examiner Bokar: All right.

Q. (Mr. Walker continuing) Do you recall any discussion on any other article of Board's Exhibit 3?

A. No, I don't; not at that meeting. I don't remember any other discussions on that. Well,—to make my answer clear,—on any of the other contracts. Any other section except that one of the Warehousemen's.

(Testimony of James Landye.)

Q. After the proposed agreement,—

Mr. Ball: (Interrupting) Just a minute. Let me have the question and answer again. Apparently I didn't get the purport of the question and answer. Read it back, please.

Trial Examiner Bokat: Yes, read it back.

(Whereupon the last question and answer were read aloud by [391] the reporter as above recorded.)

Trial Examiner Bokat: I think he is referring clearly to Section 2.

Mr. Walker: Section 2 of Board's Exhibit 3.

Trial Examiner Bokat: Suppose you physically correct the record. The question of Mr. Ball, referring to Section 2.

Mr. Walker: I thought he meant Exhibit 2.

Trial Examiner Bokat: Article 2, Board's Exhibit 3.

(Discussion off the record.)

Q. (Mr. Walker continuing) After the proposed agreement had been discussed, what next occurred?

A. The company stated,—that is, Mr. Powell; he did all the talking,—that they were willing to deal with the Warehousemen's Union 206, as they had been recognized or certified by the National Labor Relations Board. Mr. Langford, I believe, or one of the clerks,—I think it was Mr. Langford,—

(Testimony of James Landye.)

Trial Examiner Bokar: One of the officers of the Clerks' union?

The Witness: Yes. Said, was there any question as to whether the company recognized the Retail Clerks, and Mr. Powell said, No, that they had accepted the letter,—the letters which had been exchanged,—as sufficient.

Q. You are now referring to Board's Exhibit 6. Is that correct?

A. He stated, the letter. Mr. Powell stated, the letter.

Mr. Ball: Well, that is 6. [392]

A. (continuing) —as sufficient of recognition of the Clerks, and there was no question about that.

Q. Now, did you request anything?

A. Yes. I first asked Mr. Powell, would they arbitrate the whole thing except the union shop; he said, No. I then asked him, would he agree to arbitrate everything, union shop and everything; and he said, No. About that time Mr. Glazier, of the Seattle Warehousemen, got up and left the room, stating that we weren't getting anywhere and that we were back to where we started; and somebody else followed him out of the room. And I said, "Well, will the company give us a counter proposal on all the contracts,—the Retail Clerks' and the Warehousemen's was before them, and we could get the Office Workers' over immediately, as soon as possible,—and would they get it back to us by Saturday morning, a counter proposal. Mr. Powell

(Testimony of James Landye.)

asked me exactly what I meant, and I stated that I wanted the company to take each section of the unions' contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract. I told them to make a complete contract, addressed to each union. I told them then we could meet the next day, Saturday; and we could take the contracts and we would have something to work from, a limitation placed on the issues. I told them that is the way business was ordinarily conducted. Mr. Powell—— [393]

Mr. Ball: (interrupting) It is understood that respondent is not bound by any reasons or arguments advanced by Mr. Landye in this discussion?

Trial Examiner Bokat: It is just what he claims he stated to Mr. Powell; setting forth testimony of the conduct of the parties.

Mr. Ball: Not received for any further probative purpose than the effect the words might have?

Trial Examiner Bokat: I can't tell, at this time, what weight I am going to give to the words, if any.

Do you want the last part of your answer read?

The Witness: Yes, please.

(Whereupon the last part of the answer referred to was read aloud by the reporter as above recorded.)

Mr. Ball: I move to strike that out in so far as it may represent as a fact that that is the way

(Testimony of James Landye.)

business is ordinarily done, or is attempting to show that is a fact.

Trial Examiner Bokat: I am merely accepting it as his testimony.

Q. (Mr. Walker continuing) During that discussion, Mr. Landye, did you make any gestures?

A. Oh, there was some, I suppose.

Trial Examiner Bokat: Now, had you finished your answer?

The Witness: No. I want to finish this other question.

Trial Examiner Bokat: I thought you hadn't finished it. [394] Do you want some more of your answer read?

The Witness: No; I have got it. Mr. Powell stated that the company was not asking anything from us, and that it was up to us to make proposals that would please the company; and that he said his conception of negotiations was that the company had no affirmative duty to do anything, and that it was up to the union to please the company. And he stated that they wouldn't submit a counter proposal.

Q. Was there any reference to any industry, other than the mail order business, at the time of your discussion which you have just related?

A. Well, Mr. Powell stated that that was not his conception of either negotiations or labor relations, for the company to make affirmative gestures, —or words to that effect. I stated to him that that

(Testimony of James Landye.)

was not so; that I had dealt with newspaper publishers for some four or five years, and that the newspaper publishers had dealt for fifty years, and that we never discussed anything with the newspaper publishers, or negotiations with the various crafts, until proposals and counter proposals had been exchanged so we could limit the issues. I told him at that time, I thought that would be the most efficient; that we could get somewhere.

Mr. Ball: I assume I have a standing objection to receiving any of the statements of Mr. Landye as to the truth of any of the facts that he told to Mr. Powell at that time. [395]

Trial Examiner Bokat: The record may so show.

Q. (Mr. Walker continuing) Did Mr. Powell say anything to that, other than which you have already related?

A. No. He just said that it wasn't up to the company to please the union. That may not be the exact words, but to that effect.

Mr. Ball: Well, I move to strike that out, therefore, as an opinion and conclusion of the witness as to what Mr. Powell said.

The Witness: Well, it was the same as he stated before.

Trial Examiner Bokat: With that modification, I will let it stand.

Q. (Mr. Walker continuing) Now was any other question asked of Mr. Powell relative to the agreement, or, to an agreement?

(Testimony of James Landye.)

A. No. I think that was about the end. The last thing I remember is his refusal on a counter proposal.

Mr. Ball: I move to strike out Mr. Landye's description.

Trial Examiner Bokat: Yes.

The Witness: All right.

Q. (Mr. Walker continuing) Now, Mr. Landye, going back to the meeting of September 19th. Was there any discussion with Mr. Powell, or Mr. Barth, in addition to the discussion over recognition and Section 1 of the agreement?

Mr. Ball: I object to this going back over matter which the witness has already stated and to which he has testified [396] fully.

Trial Examiner Bokat: I assume there is something else that Mr. Walker has in mind that the witness may not have testified to. I don't want him testifying on old matters.

Mr. Ball: The witness has testified,—if I recall the evidence,—that he has already stated everything he can recall about the meeting.

Trial Examiner Bokat: If Mr. Walker can refresh his recollection, he has a perfect right to do that.

The Witness: May I have the question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

(Testimony of James Landye.)

The Witness: There was a discussion about the certification of the Warehousemen.

Q. (Mr. Walker continuing) And what was said about that?

A. Well, Mr. Powell stated about the company wanted to deal as a retail unit, and then the mail order side; and that is the way they conducted their business. And I told him that the Board, in the Warehousemen's case, had already overruled that contention, and that was no longer a matter of argument. I told him that in that case the warehousemen on the mail order side had been separated from the office workers, and that even some of the warehousemen in the Davis Street warehouse were actually working on the retail side; and I told him that the office workers went across from the retail to the wholesale [397] both; and then you had the warehousemen with a few men over in the retail; and that the Board had ruled in that case that they weren't separate units.

Q. Did Mr. Powell say anything to that?

A. He said he never heard of the case; and I told him when it was, and Mr. Barth,—either Mr. Barth or Mr. Barr,—between us we told him about the case. He said he didn't know about it at that time.

Q. Now, is there anything further on the meeting of December 13th that you have not related?

A. No, I don't recall. There was a lot of things going on; probably a lot of things.

(Testimony of James Landye.)

Cross Examination

Q. (Mr. Ball) Mr. Landye, before you went into the meeting of December 13th, you had already drawn the charges to be filed with the Labor Board?

A. Yes.

Q. And, of course, like a good lawyer, you had the charges in mind when you were framing your questions to Mr. Powell about counter proposals? Weren't you?

A. No, no; definitely no. We were trying to get the strike settled. That was important to me.

Q. The fact is, though, that you had filed charges with the Board for failure to bargain collectively, and had drawn them up? [398]

A. Oh, yes.

Q. Have you got a copy of the charges?

Trial Examiner Bokat: Attached to Board's Exhibit 1.

(Discussion off the record.)

Q. (Mr. Ball continuing) You will recall that on the meeting of December 13th, in discussion of your request of Mr. Powell that the company make a counter proposal, he did say that the company did have this to ask: That the employees go back to work?

A. Oh, yes. That came up at the first of the meeting. May I explain that?

Q. Yes.

(Testimony of James Landye.)

A. My recollection was not that that was brought up in the way of a counter proposal; that came up at the very first. It was said, Has the company got any proposal to make? I differentiate the two in my mind. And the company said, Yes; everybody go back to work and we would settle it.

Q. The word counter proposal means one thing to you, and it might mean,—

A. (Interrupting) No; it was not stated as a counter proposal. It was just stated, What has the company got to offer.

Mr. Ball: That is all of this witness.

(Witness excused.)

(Whereupon at 11:50 A. M. the hearing was recessed until 1:30 P. M.) [399]

Afternoon Session

(Whereupon, at 1:30 p. m. the hearing was resumed, pursuant to the taking of noon recess, as follows:)

Trial Examiner Bokat: The hearing will be in session.

Mr. Ball: Perhaps we could stipulate the Interstate Commerce part at this time.

Trial Examiner Bokat: That might be just as well.

Mr. Ball: It is stipulated between the parties, first, that Montgomery Ward & Co., Incorporated, hereinafter referred to as Ward's, is an Illinois Corporation, duly licensed to do business in the State of Oregon;

(2) Ward's is engaged in the sale and distribution of general merchandise at retail through the media of mail order houses and retail stores;

(3) Ward's operates nine mail order houses and 650 retail stores throughout the United States;

(4) Ward's operates a mail order house in the City of Portland, Oregon, and operates a retail store in Portland, Oregon;

(5) Approximately 1200 persons are presently employed at the Portland mail order house;

(6) Approximately 175 persons are presently employed at the Portland retail store;

(7) Approximately 90 per cent. of the merchandise handled both by the Portland mail order house and the Portland retail [400] store is shipped into Portland from points outside of the State of Oregon;

(8) Approximately 60 per cent. of the sales made by the Portland mail order house are delivered to customers outside of the State of Oregon, through deliveries in Portland, Oregon and through common carriers designated by the customers;

(9) More than 99½ per cent. of the sales made by the Portland retail store are delivered to the customers and completed within the State of Oregon;

(10) The Portland mail order house and retail store are operated as separate units, each having its own resident manager. The retail store manager reports to the Regional Manager in Oakland, California, who, in turn, is responsible to the Retail Operating Manager in Chicago, Illinois.

The mail order manager reports directly to the mail order operating manager in Chicago, Illinois.

(11) The Portland retail store sales amount to approximately three million dollars annually;

(12) The Portland mail order house sales amount to approximately thirteen million dollars annually.

Trial Examiner Bokat: Is that stipulation agreeable to you, Mr. Walker?

Mr. Walker: It is agreeable.

Trial Examiner Bokat: It is so stipulated.

Mr. Ball: The Respondent, in making this stipulation, [401] does not intend to admit the jurisdiction of the National Labor Relations Board over its retail store and retail store operations in the City of Portland, but it reaffirms its position that it does not deny the jurisdiction of the Board over its mail order house and its mail order operations.

Trial Examiner Bokat: Call your witness, Mr. Walker.

Mr. Walker: I will call Mr. Hicks.

JAMES HOWARD HICKS

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: James Howard Hicks, 1332 Southeast Rex.

Direct Examination

Q. (Mr. Walker) In Portland?

A. Portland, Oregon.

Q. Are you connected with any labor organization? A. Yes.

Mr. Ball: Can't we stipulate that he is?

Mr. Walker: That he is secretary-treasurer of the Office Employees' Union, Local 16821, affiliated with the American Federation of Labor?

Mr. Ball: I will stipulate to that.

Trial Examiner Bokat: It is so stipulated.

Q. (Mr. Walker, continuing) In that capacity, do you meet [402] or have you met with any of the representatives of Montgomery Ward & Company?

A. Yes, I have.

Q. When did you first meet with them?

A. The first meeting was only a brief meeting, in the office of Mr. Huddleston, the latter part of August or the fore part of last September. I was with Mr. Langford and Mr. Dixon.

Q. Now, what occurred at that meeting?

A. Briefly, as I stated before, the meeting was very short. We were assured by Mr. Huddleston

(Testimony of James Howard Hicks.)

that no negotiations were in progress at that time between the Company and the Warehousemen.

Q. Had you inquired about that of Mr. Huddleston? A. We did at that meeting.

Q. Was there anything else that took place at that meeting? A. No.

Q. After that, did you meet with any of the representatives of Montgomery Ward & Company?

A. Yes.

Q. When?

A. On the 22nd of August, the meeting which has been referred to before.

Q. October 22, you mean?

A. October 22, that is correct.

Q. Did you take any part in that meeting?

A. Very slight. [403]

Q. Just tell us about it.

A. I had a very minor participation. My only participation was to assure Mr. Barth, and the gentleman back there (pointing)——

Mr. Ball: Mr. Powell?

Trial Examiner Bokar: Which gentleman?

The Witness: I can't think of his name.

Mr. Ball: Mr. Powell?

The Witness: Mr. Powell, that is right.

Q. (Mr. Walker, continuing) Will you go ahead and relate what you did?

A. My part was just to assure them that the letter that they had received, signed by both Mr. Dixon and myself, was correct in its statement that

(Testimony of James Howard Hicks.)

the Retail Clerks could bargain for the office workers and their department.

Q. How did you happen to mention that?

A. Well, I think that they had asked me.

Q. Who?

A. Well, the letter had been mailed,—

Mr. Ball: I wish to strike any statement of the witness about the letter. The letter is in evidence, and speaks for itself.

Trial Examiner Bokat: Yes. I will be bound by what the letter says. I will disregard anything else as to its contents.

Q. (Mr. Walker, continuing) Had Mr. Powell asked you about that [404] at the meeting?

A. Yes.

Q. In response to his questions, you replied to him as you have just now indicated? A. Yes.

Q. What else did you say at that meeting?

Mr. Ball: I am not sure we know what is meant by “just as you have now indicated”.

Trial Examiner Bokat: Suppose you have him state what he said?

Q. (Mr. Walker, continuing) What did you say to Mr. Powell?

A. I assured Mr. Powell that my organization,—that we still did have jurisdiction over the Office Workers in the retail department, and that the negotiations, however, could be carried on with the Retail Clerks.

(Testimony of James Howard Hicks.)

Q. Was there anything else said by you at that meeting? A. No.

Q. Was there any discussion between you concerning the office workers at that meeting?

A. Yes.

Q. What was said?

A. Mr. Powell asked me approximately how many we had organized out there.

Q. Did you answer? A. Yes, I did. [405]

Q. What did you answer?

A. I told him that we had approximately two-thirds.

Q. Two-thirds of what?

A. Of the people under our jurisdiction.

Q. Was there any question put to you about who you represented? A. Not that I recall.

Q. Was there any discussion concerning what types of persons could come under your jurisdiction, or came under your jurisdiction?

A. I would say "no".

Mr. Ball: Will you read that last question and answer, please?

(Thereupon the last question and answer were read aloud by the reporter as above recorded.)

Q. (Mr. Walker, continuing) I call your attention to what has been marked as Board's Exhibit No. 6. Did the original of that bear your signature?

A. Yes, it did.

(Testimony of James Howard Hicks.)

Q. Was there any discussion concerning Board's Exhibit 6 at that meeting?

A. I can't say that there was; they acknowledged receipt of the letter.

Q. Who did? A. Mr. Powell.

Q. (Mr. Walker, continuing) Mr. Powell? [406]

A. Mr. Barth, through Mr. Powell.

Q. What else took place?

A. There was an endeavor to carry on negotiations between Mr. Dixon and Mr. Powell.

Q. Well, what do you mean by that?

A. I mean that they brought out the Retail Clerks' agreement as having been previously submitted, and they started out with the original understanding that they would go through the agreement, article by article.

Q. You are speaking about Board's Exhibit 7, is that correct? (Handing document to the witness)

A. This is the agreement that they submitted, (indicating), yes.

Q. After that, did you meet with any representatives of the company? A. Yes.

Q. When? A. On December 13.

Q. Was there any discussion concerning workers at that meeting?

A. I would say only in a general way, in so far as it applied to the three unions which were represented at that time.

Q. What do you mean by that?

A. Well, we were referred to as the representa-

(Testimony of James Howard Hicks.)

tives,—not the representatives,—but the Unions involved in the strike at that time in progress against the company. [407]

Q. Was there any discussion concerning the strike at that meeting? A. Yes, there was.

Q. What was it?

A. Well, it was acknowledged by the Unions that we were desirous of negotiating an agreement with the company. The company, through Mr. Powell, expressed a desire that the picket lines be removed, and that the normal operations of the company be allowed to follow their channels.

Mr. Ball: By the way, I will stipulate with you that this Board's Exhibit No. 10 can go in.

Mr. Walker: All right.

Trial Examiner Bokat: Do you want to offer it?

Mr. Walker: I will offer it.

Trial Examiner Bokat: Board's Exhibit 10 is received in evidence, without objection.

(Whereupon the document heretofore marked Board's Exhibit 10 for identification was received in evidence)

1810

DEPARTMENT STORE
WAGE SCALE AND AGREEMENT
of
RETAIL CLERKS UNION, LOCAL 1267
Retail Clerks International Protective Assn.

Between _____, of Portland, Oregon and Local No. 1267, Retail Clerks International Protective Association, of Portland, Oregon and affiliated with the American Federation of Labor.

THIS AGREEMENT, mutually made and entered into this _____ day of _____, 1940, by and between _____ of Portland, Oregon, Party of the First Part, and the Retail Clerks International Protective Assn., Local No. 1267, of Portland, Oregon, Party of the Second Part, to-wit:

SECTION 1. Employers shall be entitled to employ or hire any employees, provided, however, that such employee shall make application within two (2) weeks after being employed to become a member of the Union and if satisfactory to the employer and found worthy by the Union he will be admitted to full membership in the Union.

(a) A temporary working permit good for thirty (30) days only shall be secured by all new or extra salespeople, not members of the Union at the time of employment, provided they are employed more than one (1) day. No working permits shall be issued until all available regular employees of the company are restored to full time service if competent, and available. All new steady employees working half time or in excess, shall be issued a permit for thirty (30) days only, at the expiration of which time they shall affiliate with the Union provided, they are still employees half time or in excess. Regular extra employees who are employed less than half time shall secure a working permit from the Union the first of every month.

SECTION 2. All persons employed by the Party of the First Part who are actively engaged in selling shall be members of the Retail Clerks Union, Local No. 1267, and all other employees as designated by ensuing classifications shall be members of Local 1267. Window trimmers and assistants; mail order department employees; floor cashiers; outside salesmen; marking room employees; bundle wrappers; and all other employees not coming under the jurisdiction of any other Union, except executives. The exception of the executives are to be agreed upon between the Business Representative of the Union and the Representative of the Employer.

SECTION 3. No male employee shall be discharged and replaced by a female employee unless the female employee shall receive the minimum wage for men as classified. This shall not apply when a male employee leaves the company of his own accord or is dismissed for good and sufficient reason.

SECTION 4. No regular full time and no regular part time employee shall suffer any reduction of pay or be required to make up any time for holidays, the following holidays to be observed: New Year's Day, Memorial Day, Fourth of July, Armistice Day, Labor Day, Christmas Day; and all other holidays nationally or locally observed by the stores parties to this agreement. When a holiday falls on Sunday the following Monday shall be observed.

SECTION 5. In the laying off of help due to slackness of business and in the consequent re-employment, seniority rights shall be observed.

SECTION 6. A mutually agreeable system shall be worked out between the employers, parties to this agreement, and the Union to permit the Union activities of receiving complaints and collecting dues during store hours, provided that such activities shall be conducted at reasonable times and so as not to interfere unreasonably with the conduct of the employers' business or to interrupt or interfere with the performance of work.

SECTION 7. There shall be no discrimination by the Employer against any employee or applicant on account of membership in or on behalf of the Union.

SECTION 8. Duty authorized representatives of the Union, not on the payroll of the employer, shall be permitted to visit the stores, for the purpose of observing conditions under which members of the Union are working, and to see that the agreement is observed; provided that such visits shall not be made during rush hours, and that the time of such visits shall be arranged with the employer. The Employer agrees to cooperate in arranging for such visits at reasonable times and to name two (2) or more persons in each store, each of whom shall have authority to make arrangements for such visits.

SECTION 9. The Employer shall provide in each store a bulletin board or boards, conveniently located, for the posting of notices of official business of the Union. The Union agrees that it will not distribute handbills, posters or other literature within the store. The Employer will provide a receptacle or receptacles, at or near such bulletin board in which the Union may place such notices of official business from 2 o'clock on.

SECTION 10. For the purposes of this agreement, employees are designated as follows: (a) Regular full-time employees; (b) Regular short-hour employees; (c) Extra employees. These are defined as follows:

(a) A regular full-time employee is one who has been employed to work a full number of hours each week. Any employee continuously employed on a full time basis by the Employer for at least six (6) months shall be considered a regular full-time employee.

(b) A regular short-hour employee is one who has been employed regularly less hours per week than a full working week. Any employee who has been continuously employed by the Employer on a short hour basis for at least six (6) months shall be considered a regular short-hour employee.

(c) An extra employee is one employed for temporary work.

(d) A break of service shall not prevent such service from being continuous under subdivisions (a) or (b) of this section, provided that six (6) months of actual service shall have been rendered within a total period of two (2) years from commencement of employment.

Experience shall be based on the total experience accumulated in retail stores or departments of the same classifications.

(e) It is understood and agreed that all of those employees who were employed as regular full-time employees, or regular short-time employees, as of _____, and who at the time of signing of this agreement, will not have had six (6) months service shall automatically be rated as regular status full-time employees, or regular short-hour employees as the case may be.

(f) The term "regular" used in this section refers to the status of an employee within the particular establishment in which he is working. To attain such regular status employee must have had six (6) months of continuous employment as defined above, with the same employer in Portland.

SECTION 11. (a) Each employee shall be provided with a card setting forth classification of employment, wage and daily schedule of hours of employment with the starting and finishing time for each day.

(b) Immediately after the signing of this agreement there shall be established a Classification Committee composed of three (3) representatives of the Employer and three (3) representatives of the Union. It shall be the duty of this Committee to pass on all matters pertaining to adjustments of the classification of employment.

SECTION 12. (a) Forty-four hours completed within six days shall constitute a week's work. Employees shall be placed on a straight time schedule of hours, such schedule to be entered on employees' classification cards. Before any change is made in any such schedule one week's notice shall be given to the employees affected, except in cases of emergency or where the change is mutually agreed to by the Employer and the employee affected.

(b) Overtime shall be paid for at the rate of time and one half.

(c) All sales or transactions are to be completed if they are taking place at the normal quitting time of the employee without payment of overtime.

(d) Overtime shall be paid for all work prior to 9:15 A.M. or after 5:45 P.M. as the case may be, and except in the case of those employees whose work must be necessarily be performed in whole or in part before 9 A.M. or after 5:45 P.M. as the case may be.

(1) Mail openers and distributors, sales audit clerks, cash register readers, stock distributors;

- (2) Extra wrappers, packers, parcel post and delivery employees who on Saturdays are required to report for duty after 1 PM.
- (3) Employees required for inventory work on one night in January and one night in July.

(e) Outside salesmen, collectors, appraisers and adjusters shall be exempt from all limitations of hours except when required to do inside work.

SECTION 13. No one shall be sent to lunch prior to eleven (11:00) AM. Every employee shall be sent to lunch at least within five (5) hours of the time of their reporting to work. Any employee who works in excess of five (5) hours without a lunch period shall receive overtime for all such work performed in excess of five (5) hours. All sales or transactions shall be completed if they are taking place at the time the person is to go to lunch without the payment of overtime.

SECTION 14. When a company doctor pronounces an employee physically unfit to carry on their active duties as an employee, the employee shall have the right to demand an examination by an outside doctor supplied by the Union. If the two doctors are unable to agree on the diagnosis they shall call in a third doctor and the decision handed down by the third doctor shall be binding. The cost shall be borne equally by the employer and the Union.

SECTION 15. (a) All regular employees who have been in the service of the Employer continuously for one year shall be granted a minimum of one week's vacation with pay. All regular employees who have been in the service of the Employer continuously for two years shall be granted a minimum of two week's vacation with pay. In cases where stores have vacation policies which are not in conflict with the foregoing said policies may be retained. Vacations shall be granted between April 1 and October 1 or at other times if mutually agreeable. This provision shall be effective after the current vacation schedule.

(b) In the case of regular short-hour employees pay for the vacation period shall be the average weekly pay received by such employee during the year preceeding the vacation.

(c) Leaves of absence or any employee called for government service shall be granted at the discretion of the Employer, and when so granted employee shall be assured of his return to employment without loss of standing.

SECTION 16. Employers shall have the right to discharge any employee for unbecoming conduct, insubordination, incompetency, neglect of duty, failure to perform work as required not contrary to the terms of this agreement, or to observe safety rules and regulations, or the employers' store rules, which shall be conspicuously posted. If an employee feels he has been unjustly discharged, he shall have the right to appeal to the Adjustment Board.

SECTION 17. To insure that full and fair consideration be given all employees in filling vacancies or new positions, in making transfers, promotions, or wage increases, the Employer agrees to review regularly the records of all employees.

SECTION 18. It is understood and agreed that quota systems shall not be used as the sole basis for discharges.

SECTION 19. Stock help shall be provided for the Women's Coat Departments, Yardage and blankets.

SECTION 20. (a) The Employer may require sales employees to do non-selling work providing that such assignments shall not be made during the peak hours and recognizing at all times the common interest of the Employer and of sales employees in the enjoyment by the latter of all reasonable and practicable opportunities of effecting sales. It is further agreed that such assignments shall be equitably distributed between the various members of the department.

(b) The Employer may make temporary assignments of non-selling employees to do selling work during peak hours or seasons only, but keeping in mind also the common interest of the Employer and of the selling employees in the enjoyment by the latter of all reasonable and practicable opportunities of effecting sales.

SECTION 21. If compulsory sales or educational meetings are held they shall be on the Employers' time. Provided, however, that this does not apply to applicants who do not subsequently report for work.

SECTION 22. All contributions to charity shall be voluntary. It is understood and agreed that no compulsion shall be placed on the employees to force contributions.

SECTION 23. Not oftener than once a month sales employees, upon individual requests, shall be furnished with records of their sales, provided such sales are individually recorded.

SECTION 24. Department heads, buyers and assistant buyers, making sales shall enter the same on a department book, such sales to be divided equally among the employees in the department, provided, however, that where department heads, buyers and assistant buyers have their own books this principle shall not apply.

SECTION 25. An employee whose earning capacity is limited because of physical or mental handicap, or other infirmities, may be employed on suitable work at a wage agreeable to the Employer, the employee and the Union.

SECTION 26. (a) The Employer agrees to pay all fidelity bond premiums. All cash deposits or cash bonds in lieu of fidelity bonds now in force will be returned to the employees so affected at once. No employee shall be required to pay any premiums on public liability and property damage insurance required by the Employer, and covering the operation of an automobile while used in the Employer's business. Charges for physical examinations or sales training when required by the Employer shall be borne by the Employer.

(b) Any employee using his automobile for company service shall be compensated at the rate of five (5) cents per mile for all miles so used required by the Employer.

SECTION 27. The provisions of this agreement shall apply to all departments leased or subleased to others except where and so long as bona fide agreements or leases between the employers and lessees or sub-lessees in force at the date of this agreement do not permit such application. Subject to the exception stated in the preceding sentence of this paragraph, the provisions of this agreement shall also apply to employees acting as demonstrators or selling jointly for the Employer and others.

SECTION 28. Where the Employer requires employees to wear identical garb as to style or fashion, when such garb is not suitable for street wear, the Employer shall furnish the same. The Employer shall also provide for the maintenance of such garb.

SECTION 29. No more than one (1) apprentice shall be employed for each twenty (20) employees. These apprentices shall be reasonably divided among the different departments of the store, both selling and non-selling. It is agreed that an apprentice is an employee having less than six (6) months experience in the retail trade, who receives less than the minimum wages specified herein for experienced employees and not less than the minimum scale for apprentices as herein provided for. Time served in one or more stores as an apprentice shall be cumulative.

SECTION 30. No salary rate herein provided shall be considered other than a minimum wage, and no salary rate above the minimum provided herein shall be reduced.

Before any Employer terminates Group Insurance in effect at the signing of this agreement, he shall give thirty (30) days notice of his intention to terminate to the employees affected.

SECTION 31. The following are agreed classifications, minimum weekly and monthly rates of pay thereof, and special working conditions as listed under the specified classifications noted:

1. (a) Men's Clothing

\$23.00	First year experience
25.00	Second year experience.
32.00	Over three years experience.

(b) Men's Furnishings

\$22.50	First six months experience.
25.00	Second six months experience
27.50	Thereafter.

2. Shoe Department

(a) Every regular male employee shall receive a minimum wage of \$97.50 per week, or \$119.50 per month. Extra male help shall receive a minimum wage of \$5.00 per day.



(b) Every part time employee shall receive a minimum wage of seventy-five cents (\$.75) per hour if employee works less than a full day. Any employee shall not work less than four hours in any one day.

(c) Every female employee shall receive a minimum wage of \$22.00 per week, or \$47.60 per month.

(d) Every part time female employee shall receive a minimum wage based on the above minimum scale in proportion to the number of hours she works bears to the full day and shall not work less than four hours in any one day.

(e) Every apprentice shall receive a minimum wage as follows:

\$12.50 per week.	\$64.16 per mo.	First six months
17.80 per week.	78.83 per mo.	Second six months
22.80 per week.	97.50 per mo.	Third six months
25.00 per week.	103.33 per mo.	Fourth six months

(f) All wages, salaries and commissions in force at the time of the making of this contract, greater than the minimum wages guaranteed under this contract, shall be continued in force, and any attempt on the part of the employer to diminish or cut down such wages or either or both shall constitute a breach of this contract.

(g) Disregard the monthly pay clause if store is paying by the week.

(h) Any employee reporting for work at opening time shall receive a full day's pay.

3. Women's Ready to Wear and Corsets: Women employed in Ready to wear; suits, coats, silk dresses, corseteers, gloves, piece goods, blankets, draperies and hats shall receive the following scale:

\$16.00.	First six months experience
18.00.	Second six months experience
22.50.	Third six months experience
25.00.	Thereafter.

4. Miscellaneous Classifications: Service desk, candy, drugs, dry goods, wash dresses, lingerie, ladies underwear, infants wear, bargain room & markers:

\$16.00.	First six months experience
18.00.	Second six months experience
22.50.	Thereafter.

5. Hardware: Hardware, sporting goods and paints.

\$20.00.	First six months experience
25.00.	Second six months experience
27.50.	Third six months experience.
32.50.	Thereafter.

6. Jewelry: \$25.00 per week.

7. Household: Stoves, major appliance, radios, furniture and rugs.

There shall be minimum guarantee of \$35.00 per week for experienced men. The men to work on percentage basis with stipulated guarantee.

8. Stockmen and Farm Basement. \$32.50 per week.

9. City Delivery: Shipping Clerk. \$32.50 per week

Doormen. \$27.50 per week

Supervisor. 35.00 per week

10. Service Station:

Collectors and adjusters. \$27.50 per week

Service and repairs. 27.50 per week

11. Window trimmers and display men:

Combination employees, including window trimmers or those working in more than one department shall receive one-half of the difference between the two scales applying over and above the lower scale. This provision does not apply to employees whose work in an additional department is incidental and occasional. \$35.00 per week.

12. Farm equipment and plumbing:

\$25.00 per week. First six months experience

27.50 per week. Second six months experience

32.50 per week. Thereafter.

13. Catalog order desk:

16.00 per week. First six months experience

18.00 per week. Second six months experience

22.00 per week. Thereafter

14. Outside Salesmen: The outside salesmen shall be guaranteed a weekly drawing account of not less than \$25.00 and five cents (\$.05) mileage for all miles used for company service. Their hours will not be restricted.

INCREASE

No

15. Tires, Automobile parts and accessories:

\$25.00 per week.First six months experience
\$7.50 per week.Second six months experience
\$5.00 per week.Thereafter.

Purchasing Agent- Any employee designated as a Purchasing Agent actively engaged in the Parts Department handling parts shall be paid not less than One Hundred and Seventy-five dollars (\$175.00) per month.

Parts Manager - In charge of the Department and receiving in excess of one hundred and seventy-five dollars (\$175.00) shall not be subject to the terms of this agreement.

All parts departments and Accessories departments will close to the public between the hours of 5:45 PM and 9 AM.

SECTION 32. General Utility Employees: General Utility Employees shall be those employees not definitely regularly assigned to specific duties in any selling or non-selling department. They may be used at the discretion of the employer in any department of the store and for any duties, either selling or non-selling, as the occasion arises. Their number shall not exceed six (6) for the first one hundred(100) and five (5) for each one hundred(100) thereafter. The minimum pay for such employees shall be twenty-seven dollars and fifty cents (\$27.50).

SECTION 33. Extra Employees. All extra employees shall receive a differential of five cents (\$.05) per hour above the scale in the classification in which they work, with a guarantee of four (4) hours pay when ordered to report for work.

SECTION 34. Regular Short-Hour Employees: Regular short-hour employees shall receive the rate of pay provided for the classification in which they are employed.

SECTION 35. Apprentices: The minimum weekly wage for apprentices shall be not less than sixteen dollars (\$16.00).

SECTION 36. Assistant Buyers, Department Heads and Heads of Stock shall receive at least 10% increase in their guaranteed weekly rates above the maximum scale of their departments.

SECTION 37. All employees working split shifts shall receive one dollar (\$1.00) extra per day.

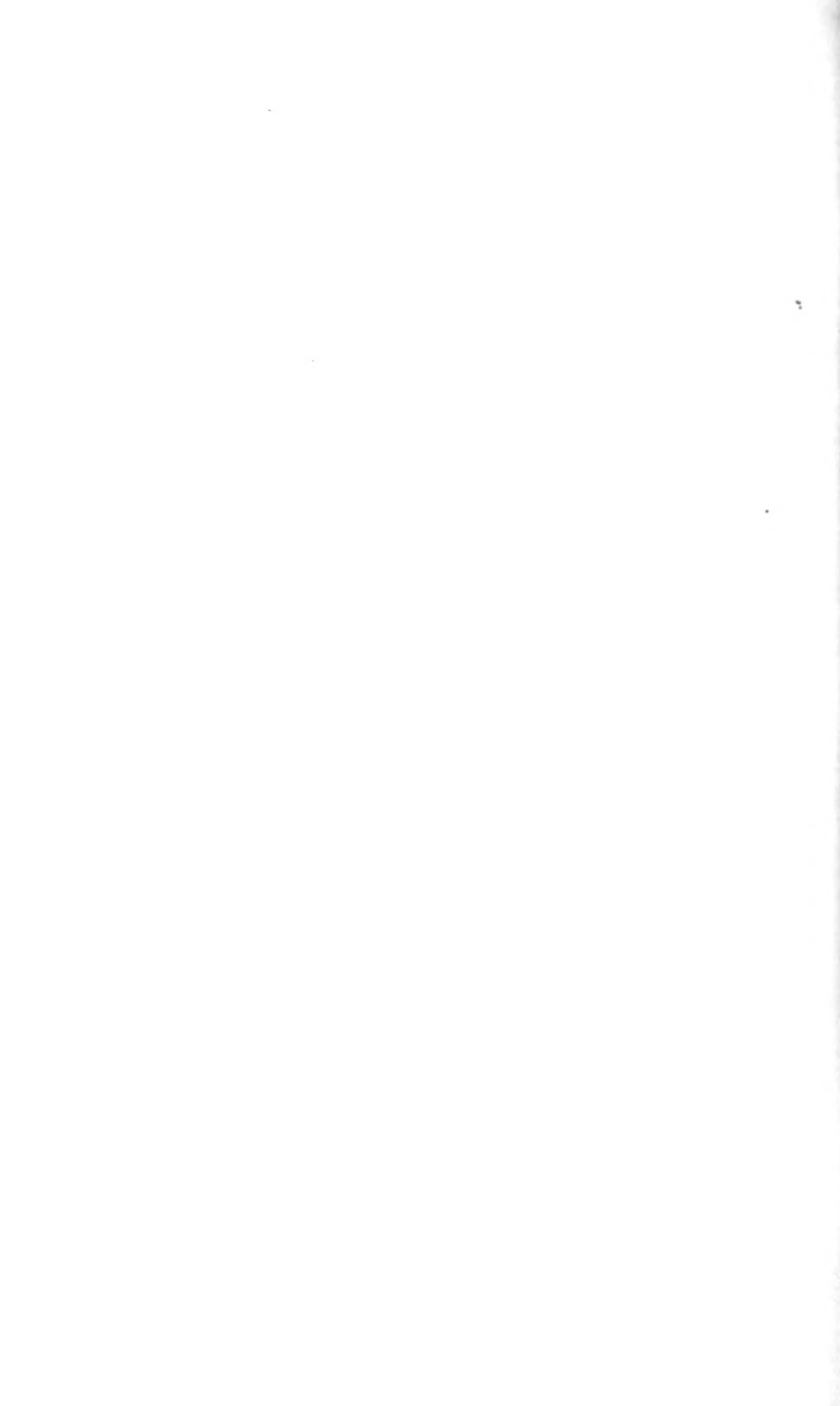
SECTION 38: (a) The monthly quota shall be for each month one-twelfth of the total yearly quota of the year from _____, to _____. Such monthly quota shall be maintained at the same figure for each month of the year. Deficiencies shall not be carried forward from one month to another. The present rate of commissions applicable to quotas shall not be reduced, nor shall any present rate of commission be reduced. Commissions shall be paid monthly.

(b) Those employees below the minimums herein provided shall be increased to such minimums, but in no case shall employees receive less than a 10% increase in their guaranteed weekly salary or weekly drawing account, up to and including employees receiving \$34.99 per week as a weekly minimum guarantee or a weekly drawing account.

SECTION 39: Immediately upon the signing of this agreement there shall be established an Adjustment Board made up of three (3) representatives of the Employer and three (3) representatives of the Union. The Board shall meet within ten (10) days of the signing of this agreement and select by mutual agreement a panel of five (5) impartial persons, any one of whom may act as arbitrator at such time as the Adjustment Board is unable to agree upon any matter referred to it.

If the parties hereto are unable to agree within twenty(20) days after the signing of this agreement to the panel of five(5) impartial persons who may be requested to act as arbitrators, _____ shall each be requested to designate three (3) persons who in their opinion are qualified to act as impartial arbitrators. From the total list so made up each party may strike two (2) names and the remaining names shall constitute the panel from which an arbitrator shall be selected as provided herein.

No arbitrator shall be chosen to serve in two consecutive arbitrations unless by mutual consent of the parties.



The Adjustment Board shall consider all complaints and disputes arising under the terms of this agreement, all questions of interpretation of the agreement and discharge cases. All discharge cases must be appealed to the Board within four (4) days from the date of discharge, otherwise the right to appeal is lost. The Board of Adjustment shall have no authority to negotiate a new agreement.

Any matter referred to the Adjustment Board shall be taken up by the Board within forty-eight (48) hours. If the Board is unable to reach a settlement within five (5) days then the matter shall be submitted for disposition to one of the persons on the panel of impartial arbitrators selected by lot. Any decision made by a majority of the Adjustment Board or as a result of arbitration, shall be accepted as final and binding. Any expenses incurred as the result of arbitration shall be borne one-half by the Union and one-half by the Employer.

SECTION 40: In consideration of the Employer signing this agreement and fulfilling the conditions thereof, the Association agrees to notify its membership, the Central Labor Council of Portland, Oregon and the District Council of the State of Oregon that the Employer herein has signed this collective bargaining agreement with the Association. The Association further agrees to loan to the Employer, Union Store Card No. _____ the property of an issued by the Retail Clerks International Protective Assn., affiliated with the American Federation of Labor, for the period this contract shall be full force and effect; provided, however, that the employer agrees to surrender said Union Store Card so loaned to him as aforesaid upon the expiration of this agreement, or upon demand made upon him by the Association, or upon violation of any provision or provisions of this agreement.

SECTION 41. This agreement shall be in full force and effect to and including the _____ day of _____, 1940; and shall be renewed for the following year and from year to year thereafter unless either party shall give written notice to the other at least sixty (60) days prior to any _____ day of _____, during the life of this agreement of a desire to amend this agreement.

If, after giving such notice and prior to the ___ day of ___ next ensuing, the parties shall fail to agree to such amendments, this agreement shall terminate at the expiration date; provided, however, that the parties may, by mutual written agreement, extend the agreement for a specified period beyond such expiration date for the continuance of negotiations; and ~~and~~ ^{and} provided, further, that after either party has given such sixty (60) day written notice of a desire to amend the agreement, either party may, not less than twenty (20) days prior to the expiration date, give to the other party written notice that it desires to terminate the agreement at the expiration date, in which event the agreement shall so terminate at such expiration date.

IN WITNESS WHEREOF the parties have hereunto set their hands, duplicate, by their respective officers or representatives hereunto duly authorized at the City of Portland, State of Oregon.

FOR THE EMPLOYER

FOR THE UNION

10
O.E.U.
15821 (75)

(Testimony of James Howard Hicks.)

Q. (Mr. Walker, continuing) Mr. Hicks, will you refer to what has been marked as Board's Exhibit No. 11 and state what that is?

A. That is the agreement submitted to Montgomery Ward by the Office Employees' Union.

Q. When was it submitted?

A. If I recall correctly, the morning of the 13th.

Q. And to whom was it submitted? [408]

A. Mr. Powell.

Q. Did you attend the three meetings?

A. Yes.

Q. Each one of them? A. Yes.

Q. At any of the meetings, was there any discussion concerning Board's Exhibit 11 for identification?

A. Only at the last meeting, the meeting of the 16th.

Q. What was said concerning Board's Exhibit 11 for identification at that time?

A. Well, if I might reiterate for a moment, of course, it was understood that the Warehousemen's agreement was the first agreement to be discussed, and when we picked up this agreement which was the second one to be discussed, it was agreed that the articles which were similar to the articles in the Warehousemen's agreement,—that the comment that was given with reference to those similar articles in the Warehousemen's agreement, would apply to the articles in this agreement, correspondingly.

Q. Whom did you have that understanding with, or who had that understanding?

(Testimony of James Howard Hicks.)

A. It was generally understood by everyone present; it was in order to expedite matters.

Q. Was something said along that line?

A. Yes. [409]

Q. How was Board's Exhibit No. 11 discussed, or in what manner?

A. May I go through it and tell you?

Q. Surely.

A. Well, it was agreed that Article 2 in this agreement, which was the Union shop article, was opposed to company policy.

Trial Examiner Bokat: Will you speak a little louder, please?

The Witness: That Article 2, which was the Union shop agreement, was also opposed in this agreement, as it was in the Warehousemen's agreement, because it was contrary to company policy.

Q. (Mr. Walker, continuing) What did you do with it?

A. We just passed over it. Article 3, calling for the discharge of employees who were incapable or incompetent, that met with the general approval of the company.

Q. What do you mean by that?

A. Well, I am not positive that Mr. Powell made this remark on this article, but on numerous of the articles, it was stated by Mr. Powell that it would meet with the approval of the company providing the wording was changed to suit the company.

(Testimony of James Howard Hicks.)

Q. Did he indicate the way in which he desired it to be changed? A. No.

Q. Was there anything said to the representatives of the company?

Mr. Ball: Just a moment. I move to strike the last answer as being an opinion and conclusion of the witness, as to whether [410] or not he did indicate, because the testimony so far has shown that suggestions were made by the company which would indicate the manner in which the clauses could be written, and the answer of this witness is obviously a conclusion on this point.

Trial Examiner Bokar: I will ask that the witness be more specific in regard to Article 3. Can you be more specific in regard to what any representative of the company stated?

The Witness: I don't believe that I could be on this particular question.

Trial Examiner Bokar: Do you have any recollection that, in principle or substance, the company accepted Articles 2 and 3, or asked that the wording be modified or changed?

The Witness: I don't recall.

Q. (Mr. Walker, continuing) Was there any question about whether or not the agreement as a whole was agreeable or not agreeable? Was any such question put to any representatives of the respondent? A. Yes.

Q. Who asked that question?

(Testimony of James Howard Hicks.)

A. Mr. Langford of the Retail Clerks asked that question.

Q. When did he ask that question?

A. Before we went into the agreement itself.

Q. Was it answered?

A. Mr. Powell answered.

Q. How did he answer? [411]

A. In the negative.

Q. Now, after discussing Article 3, what next did you do?

A. I believe the next article to be discussed was Article 5, relating to holidays.

Q. What about Article 4?

A. I don't recall any discussion on Article 4.

Q. Was there any indication relative to Article 4, whether it was acceptable or not?

A. Not that I recall.

Q. What was said about it?

Mr. Ball: Just a minute. Will you read that previous question and answer, Mr. Reporter?

(Thereupon the answer and question referred to were read aloud as follows:

"Was there any indication relative to Article 4, whether it was acceptable or not?

"A. Not that I recall.")

Mr. Ball: I object to the question, and move to strike the answer. The way the question was formed, it obviously called for an opinion and conclusion of the witness.

(Testimony of James Howard Hicks.)

Trial Examiner Bokat: Will you reframe the question?

Q. (Mr. Walker, continuing) What disposition was made of Article 4?

Trial Examiner Bokat: If any?

A. I would say that the only disposition was that it was [412] passed over.

Q. (Mr. Walker, continuing) Was any reason given for it being passed over?

A. Not that I remember.

Trial Examiner Bokat: Mr. Walker, may I interject at this point and ask you if you feel it necessary to go through the paragraphs of the Office Employees' proposed contract, since the complaint does not allege that the respondent refused to bargain collectively with regard to this particular union?

Mr. Walker: I think that point is well taken.

Trial Examiner Bokat: There is no particular dispute, so far as the Office Employees' Union is concerned.

Incidentally, I understand that they happened to be present, but that particular union does not allege, nor complain that the company refused to bargain collectively.

Mr. Walker: That is correct, and the only purpose that I have is to show the pattern of the negotiations, such as they were.

Trial Examiner Bokat: I don't know whether it is really necessary. In other words, if you are

(Testimony of James Howard Hicks.)

going to have this witness take each paragraph and go into it, the respondent will then be compelled to set forth its version when it puts on its defense regarding that particular contract. I don't know whether it is necessary or not. I would like for you to give it a little thought. Maybe you want to discuss it with Mr. Landye, and, if so, I will be glad to declare a recess for that. [413]

Mr. Landye: I think that is a good suggestion.

Trial Examiner Bokat: I can see the purpose of it, that you may want to bring out the relationship that exists, but is it necessary to go into detail, or can you just have him state that certain paragraphs were discussed, that some were accepted and some were not?

Mr. Walker: I would be willing to do that, provided it might not be called a conclusion.

Trial Examiner Bokat: I understand that. Suppose you discuss it with Mr. Landye?

Mr. Walker: Might we do that off the record, a moment?

Trial Examiner Bokat: Yes, off the record.

(Discussion off the record.)

Q. (Mr. Walker, continuing) after the meetings of December 13, 14 and 16, was there any agreement between the respondent and the Union, as to any of the contracts? A. None whatsoever.

Mr. Ball: Now, just a minute. That is objected to, not only because it calls for an opinion and conclusion of the witness, but also because it

(Testimony of James Howard Hicks.)

does not tend to prove or disprove any issue in this case, and it is irrelevant to any issue in this case.

Trial Examiner Bokat: Probably you are right, as to whether any agreement was reached between the Office Employees' [414] Union and the respondent. That would be immaterial, because there is no allegation in the complaint that the company refuses to bargain collectively with the Office Employees' Union. I do think, however, in view of the fact that this Office Employees' representative was present and submitted a contract, the record should show whether or not an agreement was reached between the Office Employees and the company.

Mr. Ball: You notice how he phrased the question?

Trial Examiner Bokat: What are you willing to stipulate to, Mr. Ball?

Mr. Ball: I am willing to agree that the end of the session came without any final agreement being entered into between the parties.

Mr. Landye: That is satisfactory.

Mr. Walker: That is fair enough.

Mr. Ball: As distinct from any agreement on any section.

Mr. Walker: I am willing to stipulate to that.

Mr. Landye: That is all right.

Trial Examiner Bokat: Well, if you will accept that, there is no use questioning the witness about it.

Mr. Walker: Then the previous question and

(Testimony of James Howard Hicks.)

answer can be stricken, in so far as I am concerned.

Trial Examiner Bokat: Yes. The previous question and answer will be stricken.

Why don't you offer the contract in evidence?

[415]

Mr. Ball: I have no objection.

Mr. Walker: I offer Board's Exhibit 11.

Trial Examiner Bokat: There being no objection, it will be received in evidence and marked as Board's Exhibit 11.

(Whereupon the document hereinabove referred to was marked and received in evidence as Board's Exhibit 11.)

BOARD'S EXHIBIT NO. 11

WAGE SCALE and WORKING AGREEMENT

This Agreement, made and entered into this..... day of....., 194....., by and between Montgomery Ward & Company of the City of Portland, State of Oregon, hereinafter referred to as the Company, and the Office Employees Union No. 16821, of the City of Portland, State of Oregon, affiliated with the American Federation of Labor, hereinafter referred to as the Union, for the purpose of fixing the wage scale, schedule of hours and general rules and regulations between the Company and the Union, and clearly to define mutual obligations between the parties hereto.

(Testimony of James Howard Hicks.)

Witnesseth

Article 1. Jurisdiction of the Union shall include the following work: stenographic, bookkeeping, office clerking, billing, filing, statistical, accounting, auditing, and all office operations not included in the jurisdiction of any other national or international union affiliated to the American Federation of Labor.

Article 2. The Company shall be entitled to hire new employes for permanent employment; however, such employes shall make application within two months after being employed to become a member of the Union, and if satisfactory to the employer and found worthy by the Union after two months' employment, he or she will be admitted to full membership in the Union. All office workers in the employ of the Company who are not members of the Union shall secure a permit to work under the jurisdiction of the Union for the duration of their employment. Permits shall not be issued for longer than two consecutive months.

Article 3. The Company reserves the right to discharge any persons in their employ if incapable or incompetent, provided that any discharged employe shall have the right to appeal such discharge.

Article 4. No person shall be discharged or discriminated against for upholding Union principles, and any person who works under the instruction of the Union, or who serves on a committee, shall not

(Testimony of James Howard Hicks.)

lose his position or be discriminated against for this reason.

Article 5. The following days shall be considered as holidays: New Years' Day, Memorial Day, Fourth of July, Labor Day, Armistice Day (if generally observed by local, downtown merchants), Thanksgiving Day and Christmas Day. For all holidays other than Sundays, employes shall be paid the same wage as though he or she had worked his or her regular shift on that day.

Article 6. Any person now receiving a higher rate of wages than provided for in this agreement shall suffer no decrease in wages or reduction in position, and no clause in this agreement shall be understood to imply a lowering of the working conditions heretofore existing in the office.

Article 7. Eight (8) hours shall constitute a day's work and five (5) days shall constitute a week's work. All overtime after the eighth hour and after the fortieth hour shall be paid for at the rate of time and one-half. All Sunday and holiday work shall be paid at the rate of time and one-half. It is further agreed that lunch hours shall not exceed one hour in duration. All employes reporting for work on any given day shall be assured of not less than four (4) hours' work.

(Testimony of James Howard Hicks.)

Article 8. The following is the minimum scale of wages mutually agreed upon:

Office worker having two years' experience.....	\$25.50
Office worker having one year's experience.....	22.60
Office worker having not less than six months' experience	20.60
Office worker apprentice having less than six months' experience	18.60

Union members who act as temporary instructors and supervisors shall be paid on the salary basis of 10% above the schedule of wages herein set forth.

Temporary and part time employes shall be paid wages based upon the above schedule.

Article 9. New employes with two years' experience in the aggregate shall begin on a salary base of one year's experience.

Article 10. No employer shall have more than one apprentice for each four (4) employes or fraction thereof.

Article 11. The wage scales specified above shall be the basic scales during the life of this agreement and shall be adjusted in accordance with the changes in the cost of living, as shown by the Index of the Cost of Living for Portland, Oregon, issued by the United States Bureau of Labor Statistics. Such adjustment shall automatically be determined by the application of the following formula: Multiply the basic scales as above specified, by the effective index number as of the date of the adjustment, and divide by the index number for September 15, 1940. Provided, however, no ad-

(Testimony of James Howard Hicks.)

justment shall be made except where such change in the cost of living will result in a change in the wage scales of at least five (5) per cent. Provided further, if at the time of the execution of this agreement, living costs as shown by such index number have fluctuated subsequent to September 15, 1940, to such an extent that the basic wage scales, as provided above, will be changed by five (5) per cent, or more, upon application of the above-mentioned formula, adjustment of such wage scales shall immediately be made and shall be put into effect. Provided no adjustment of wage scales, as in this article provided, shall result in wage scales below the minimum scales set forth in Article 8 hereof.

Article 12. All employes shall be granted two weeks' vacation with pay at the conclusion of the second year of employment. Employes with less than two years' but more than one year of service with the Company shall be allowed one week's vacation with pay. All vacations shall be taken between May first and October first of any calendar year, subject to change by agreement between the individual and the Company. Vacations of all employes shall be scheduled prior to May first with the exception of those who will complete their first or second year of service during the afore-mentioned vacation.

Article 13. In the event it becomes necessary to reduce the office force the practice shall be followed of first releasing those employes with least seniority, provided those left are capable of doing the work.

(Testimony of James Howard Hicks.)

In rehiring, employes shall be returned to work in the reverse order in which they were released. In promotions within the office consideration shall be given to length of service and new employes shall not be hired for higher positions where present employes in lower positions are capable of filling the higher positions.

Article 14. All employes shall be granted two (2) days' sick leave each month without alteration of pay.

Article 15. All female employes shall be granted fifteen minutes each morning and afternoon as a relief period which time shall be allowed on regular working schedules.

Article 16. It is agreed that any employe of the Company drafted or conscripted for Federal defense service shall not lose his, or her, seniority or position with the Company. It is understood that all drafted or conscripted employes shall be returned to their rightful status with the Company at the conclusion of such service; however, any employes returning to the employ of the Company who are not physically or mentally able to resume their previous position shall be placed in other positions if possible.

Article 17. Any dispute that may arise as to the true interpretation of this agreement or any appeal from a discharge shall be submitted to a committee consisting of one (1) member representing the Company and one (1) member representing the Union; and, if they cannot agree, the two (2) chosen

(Testimony of James Howard Hicks.)

representatives shall select a third disinterested party within one (1) week. The findings of this Board, which shall be made with all reasonable dispatch, shall be binding on both parties to this agreement. It is further understood and agreed that there will be no strike or lockout until all means to settle the dispute have been attempted. It is further understood that the duly-authorized representatives of the Union shall have the authority on behalf of the Union to execute the terms of this agreement and to represent members of the Union in all matters growing out of this agreement.

Article 18. The Company agrees that, as a condition of employment, all employes will maintain membership in good standing in the Union, and that employers shall be notified of their employes' delinquency in such regard.

Article 19. This agreement shall be in full force and effect to and including the.....day of, 194....., and shall be **renewed for** the following year and from year to year thereafter unless either party shall give written notice to the other at least thirty (30) days prior to anyday of.....during the life of this agreement of a desire to amend this agreement. It is agreed that this agreement shall remain in full force and effect for such reasonable time thereafter as shall be required for the negotiation of such amendments or new agreement.

(Testimony of James Howard Hicks.)

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day hereinabove first written.

MONTGOMERY WARD & COMPANY:

By

OFFICE EMPLOYES UNION No. 16821:

By

Countersigned:

CENTRAL LABOR COUNCIL OF

PORTLAND & VICINITY

By.....

(Whereupon a document was marked as Board's Exhibit 12 for identification.)

Q. (Mr. Walker, continuing) I hand you what has been marked as Board's Exhibit 12 for identification, and ask you if you have seen that before?

A. Yes, I have.

Q. Has that been in your possession at any time?

A. Yes, it has.

Q. When did it first come into your possession?

A. At the meeting in Mr. Huddleston's office on the morning of December 16.

Q. Whose handwriting appears on the face of it?

A. In every instance, it is mine.

(Testimony of James Howard Hicks.)

Q. When did you put the pencil writing on there?

A. At the time of the discussion of this particular agreement.

Mr. Ball: May I have the opportunity now of looking at that?

Trial Examiner Bokat: Certainly.

I assume that you are either going to question the witness about it, or offer it in evidence. Why don't you ask [416] counsel if he has any objection to it being received, or do you wish to have the witness explain some of the notations?

Mr. Walker: Yes, I wish to have him explain some markings on the exhibit.

Trial Examiner Bokat: All right.

Q. (Mr. Walker, continuing) Mr. Hicks, I call your attention to your writing which appears immediately above Article 1 on Board's Exhibit 12 for identification. Is that your handwriting?

A. That is correct; that is my handwriting.

Mr. Ball: I will stipulate that that is his handwriting.

Q. (Mr. Walker, continuing) What does the word "out" mean as it appears written across several clauses of Board's Exhibit 12 for identification?

A. There (indicating)?

Q. Yes. A. That is out.

Q. What does it mean?

A. It means that Mr. Powell definitely was opposed to that paragraph or section, and, as a consequence, I wrote over the entire article "Out".

(Testimony of James Howard Hicks.)

Q. Does that same explanation apply to every place where that word appears throughout Board's Exhibit 12 for identification?

A. I would say "yes".

Mr. Walker: I will offer in evidence what has been marked [417] as Board's Exhibit 12 for identification.

Mr. Ball: No objection.

Trial Examiner Bokar: There being no objection, it will be received and marked in evidence as Board's Exhibit 12 .

(Whereupon the document heretofore marked as Board's Exhibit 12 for identification, was received in evidence.)

A G R E E M E N T

This agreement made and entered into this _____ day of _____ 1940,
by and between MONTGOMERY WARD & COMPANY, hereinafter called the Employer, and the
WAREHOUSEMEN'S UNION LOCAL #296, I.B. of T.C.W. & H. of America, A.F. of L. hereinafter
called the Union. *(John Langstaff for Montgomery Ward & Co.)*

~~Article 1.~~ The employer agrees to recognize the Union as sole collective bargaining agency for the employees performing work in the classifications listed below in Article 4. of this agreement. No superintendent having authority from the Employer to hire or discharge men or women shall be a member of this Union.

ARTICLE 2. The Employer agrees to give preference of employment to unemployed members of the Union and in the event the Union is unable to furnish satisfactory help upon the request of the Employer, he (the Employer) may employ a non-member of the Union provided such person makes application for membership in the Union within seven (7) days after taking employment.

ARTICLE 3. Section 1. Eight (8) hours within nine (9) consecutive hours shall constitute a day's work. Forty (40) hours ~~constituting eight (8) hours, Monday to Friday inclusive,~~ shall constitute a week's work.

Sec. 2. ~~Eight~~ time shall be any eight (8) consecutive hours from 8:00 a.m. to 6:00 p.m. ~~Monday to Friday inclusive.~~ All other time shall be at the overtime rate as established in ~~Article 5.~~ of this agreement.

Sec. 3. Any work performed on any of the following named holidays shall be at the overtime rate of time and one-half as established in Article 5. of this agreement: - ~~Saturday, Sunday, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, ~~Christmas Day~~, Thanksgiving Day, and Christmas Day.~~

ARTICLE 4. The following shall be the minimum wages paid in their respective classifications:

STOCK ROOM

Stockman	\$55.00 per week
Assistant Stockman	32.50 " "
Stock helper, male	30.00 " "
Stock Order Filler, packer & checker	30.00 " "
Warehousemen	33.50 " "

SCHEDULE ACTIVITY

Heavy Pit Order Filler	32.50 per week
House Sale Order Filler "C" line	30.00 " "
House Sale Order filler "A" & "B" line	28.50 " "
Order filler, checker, wrapper, women	25.00 " "
Packer - - - - - men	28.50 " "
Packer - - - - - women	25.00 " "
Correction clerks - - - - - men	32.50 " "
Correction clerks - - - - - women	27.50 " "
Production Control Clerk	30.00 " "
Outline Clerk	25.00 " "
Mailable Pit Order filler & Part lot packer.	30.00 " "

EXAMINATION

Examiner "C" line	35.00 per week
Assistant Examiner "C" line	32.50 " "
Examiner "A" & "B" line.	27.50 " "
Stock preparation - - - - - women	25.00 " "
Stock preparation - - - - - men	28.50 " "

PACKING & BILLING

Sorter	22.50 per week
Completer	27.50 " "
Packers - - - - - men	30.00 " "
Packers - - - - - women	27.50 " "
Scalers, Multiple	22.50 " "
" Single.	25.00 " "
" Pit Scaler.	27.50 " "
Billers, Multiple.	26.00 " "
" Single.	25.00 " "
" C. O. D. Biller.	27.50 " "
Error Correction Clerk	27.50 " "
Diverted Order Clerk	27.50 " "
Belt Inspector	22.50 " "
Refund Control Clerk	25.00 " "
Large Refund Control Clerk	25.00 " "

*Co. not in
position to
grant increase
"Powell"*

4-16-41
FIVE DOLLAR
\$53.00
DANIEL W. ROSS, OFFICE REPORTER
*Mont Ward
Hicks
Hobson*

PREFERRED ATTENTION ORDER UNITS

Completer	\$28.50 per week
Packer	30.00 " "
Billor	28.00 " "
Preferred Attention Scaler	27.50 " "

SHIPPING & RECEIVING FLOOR

Shipping & Receiving Clerks	35.00 per week
Checker	37.50 " "
Elevator Opr. & Car unloading	32.50 " "
Car Loaders	37.50 " "

PACKAGE OPENING UNIT

Sign-up clerks- - - - - women	27.50 per week
Sign-up clerks - - - - - men	32.50 " "
Stock preparation girls	25.00 " "

RETAIL CITY DELIVERY

Shipping clerks	35.00 per week
Receiving clerks	35.00 " "
Checker	35.00 " "

FELT ROOM CUTTING UNIT

Stockman	35.00 per week
Assistant stockman	32.50 " "

Pipe shop order filler & stockmen	35.00 per week
Porters	27.50 " "

Technical Shade Cutter	35.00 per week
Technical Asst. Shade Cutter	32.50 " "
Linoleum Cutter	35.00 " "
Crater	30.00 " "

Tailoresses	26.50 per week
Head Tailoress	28.50 " "

Any wages now being paid above the minimum provided for herein shall not be reduced for any ~~adjustment of benefits or differences in classifications will be settled through the Board of Adjustment provided for in Article 13 of this agreement.~~

Step 11.00 of operation of this agreement
 ARTICLE 5. The overtime rate of pay shall be time and one-half ($1\frac{1}{2}$). No trading of overtime for time off.

ARTICLE 6. In the event that the Employer does not at present employ a working foreman, forelady, supervisor, or instructor, it is agreed that if one is employed, he or she shall receive fifty (50) cents a day above the rate of pay for the highest classification herein contained.

ARTICLE 7. If employees are worked over five (5) consecutive hours without a meal period, all time in excess of ~~such~~ hours without such meal period shall be at the overtime rate. Meal periods shall be so arranged as not to interfere with the normal operation of the business.

ARTICLE 8. Section 1. *There shall be no discrimination against any employees for Union activity or membership.*

Sec. 2. The Employer shall have the right to discharge any employees for insubordination, drunkenness, incompetence or failure to perform work as required or to observe safety rules and regulations and the Employer's house rules, which shall be conspicuously posted. In the event any employee feels he or she has been discriminated against or unjustly discharged, he or she shall have a right to review his or her case by the Board of Adjustment, as set forth in Article 13. of this agreement. In the event the Board of Adjustment finds the discharge to have been unjustifiable, said Board shall order reinstatement of such employee with full payment for lost time.

Sec. 3. Where the employer requests an additional medical examination of an employee, and there is a doubt in the mind of the employee as to the proper diagnosis of his or her case, the Union shall request a further examination by an impartial examiner, (to be paid by the Union). In the event both medical examiners do not agree in their findings it is further agreed that a third examiner shall be called for a final decision; said expense to be equally divided between the Employer and the Union, and the employee either returned to work with back pay or dismissed. Now employees must have physical examination within thirty (30) days.

ARTICLE 9. Lay-offs: If the work becomes slack and the Employer deems it advisable to reduce forces, employees who have been employed less than six (6) months shall be laid off first. If after all the men or women who have been employed less than six (6) months have been laid off, the Employer considers it desirable to take further measures, further lay-offs shall be in accordance with the seniority of the various employees on each floor.

In rehiring, those employees laid off last will be rehired first, and no new employees will be hired until the list of former employees is exhausted.

Seniority at Montgomery Ward & Company's main store in Portland will be as follows: Employees now employed will have preference over employees transferred from other warehouses regardless of length of time employees at other warehouses might have with the Company. Any employees transferred from other warehouses to the main store must draw the scale provided in this agreement for extra employees. In case of lay-offs employees coming in from other warehouses will be the first to be laid off.

ARTICLE 10. Employers shall adhere to their past practice of granting vacations but in no case shall a vacation be less than one week with full pay each year.

ARTICLE 11. Strikes: The Union agrees not to engage in any strikes or stoppage of work. The Employer agrees not to engage in any lockout. Any action of the employees leaving jobs for their own protection in cases of a legally declared strike by some Union directly working on the job, if said strike is sanctioned and approved by the Portland Central Labor Council, shall not constitute a violation of this clause of this agreement.

ARTICLE 12. Any person receiving wages or conditions or periods of vacation in excess of the minimums set forth herein shall not have any such benefits taken away from them, because of the signing of this agreement. All holidays, when not worked, shall be paid for as an eight hour day. When holidays are worked, the rate of pay shall be time and one-half (1½). *If working before or after holidays*

ARTICLE 13. A Board of Adjustment is hereby created to be composed of two (2) representatives of each contracting party. Said Board shall organize at once and shall elect a Chairman and Secretary and shall have the power to adjust any differences that may arise between the parties hereto regarding the meaning or enforcement of this agreement. Said Board shall meet for consideration of all matters that may be referred to it within forty-eight (48) hours subsequent to receipt by its Secretary by notice of same. The Board's decision shall be signed by a majority of the Board. If the Board cannot agree on any question referred to it within forty-eight hours, they shall then choose a fifth member who shall have no connection with either contracting party and the decision of a majority of the Board of five shall be final and binding on both parties. Pending the decision of any question referred to the Board, work shall be continued in accordance with the provisions of this contract.

ARTICLE 14. This agreement shall go into effect the ___ day of _____ 1940, and remain in effect until the ___ day of _____ 1941, and thereafter subject to thirty (30) days' notice of a desire to change by either party. If notice to desire to change or modify this agreement is served as hereinabove provided, negotiations shall start twenty (20) days from the date such notice is received.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first hereinabove written.

MONTGOMERY WARD & COMPANY

WAREHOUSEMEN'S UNION LOCAL #206

*ent. by
C. E. Johnson*

(Testimony of James Howard Hicks.)

Mr. Walker: That is all.

Cross Examination

Q. (Mr. Landye) Mr. Hicks, you have members of applications for membership in the retail store of Montgomery Ward? A. Yes.

Q. And you have membership or applications for membership on the mail order side?

A. That is right.

Q. Now, at any time has the Office Workers' Union waived jurisdiction over the employees on the retail store side?

Mr. Ball: I will object to that as calling for a conclusion of the witness on a matter that has no bearing on any issue in this case.

Mr. Landye: It goes to the unit, which is very important.

Trial Examiner Bokar: It affects the Retail Clerks' unit?

Mr. Landye: I have asked him if at any time the Office Employees have waived jurisdiction over the office employees on the retail side of the store.

[418]

Trial Examiner Bokar: I will overrule the objection. A. Not jurisdiction, no.

Q. (Mr. Landye, continuing) At your second meeting,—I am talking about the meeting of October 22,—was that the first time that you met Mr. Powell? A. That is right.

Q. Did you tell Mr. Powell that you represented the office workers or did anyone else tell him that?

(Testimony of James Howard Hicks.)

A. I would say "yes". I came in as a representative of the Office Employees' Union.

Q. Did either you or anyone else tell Mr. Powell that you represented the Office Workers at that meeting?

A. Yes.

Q. Who told that to him, if you recall?

A. Mr. Dixon and Mr. Langford.

Mr. Landye: I think that is all.

Cross Examination

Q. (Mr. Ball) At this meeting of October 22, you will recall that Mr. Powell asked you exactly the number of retail store employees you had signed up in your union, and you replied "25"?

A. I don't recall giving any specific number.

Q. Now, isn't it a fact that two-thirds of the retail store employees did approximate 25 in your computation at that time? [419]

A. No.

Q. Well, how many retail store employees did you have signed up at that time?

A. I had approximately 30.

Q. Have you any records that show that at that meeting on October 22 you had so many members signed? Is there any record anywhere that would show just how many you did have signed up, with which you could refresh your recollection?

A. Only by going over the application blanks, and then the dates might or might not be on the blanks.

Q. So you have no way to refresh your recol-

(Testimony of James Howard Hicks.)

lection as to whether it was 25 or 30 members at the meeting of October 22 amongst the retail employees of Montgomery Ward & Company?

A. Not as to the actual number, to be absolutely correct.

Trial Examiner Bokat: There isn't so much variance between 25 and 30.

Mr. Ball: That is true, but there is a question of whether he did say "25" or "30".

Trial Examiner Bokat: Yes, I understand that. The figure, however, is not off very far, either way.

Mr. Ball: I have nothing further.

Trial Examiner Bokat: Any redirect?

Mr. Walker: No.

Trial Examiner Bokat: The witness is excused.

(Witness excused) [420]

Mr. Walker: I will call Mr. W. A. McGowan. I will call Mr. McGowan as an adverse witness.

W. A. McGOWAN,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: William A. McGowan.

Trial Examiner Bokat: How do you spell it?

(Testimony of W. A. McGowan.)

The Witness: M-c-G-ow-a-n (spelling).

Trial Examiner Bokat: And what is your address?

The Witness: 2914 Northeast 64th Avenue.

Direct Examination

Q. (Mr. Walker) What is your occupation?

A. Operating Superintendent of the Fifth Floor.

Q. Where? A. Montgomery Ward.

Q. In Portland? A. Yes.

Q. Retail Store?

A. No, sir; Mail Order.

Mr. Ball: May I make a statement for the record at this time? Although I requested of Mr. Walker that, in providing the names of our supervisors whom he claimed had made statements which constitute 8-1 violations and Mr. McGowan's name was [421] furnished to me, Mr. Walker did not give me the names of the parties to whom the statements were supposed to have been made. So, I have not consulted with or taken the matter up with Mr. McGowan, and have not had any opportunity to examine into any records or facts he might have as to any conferences with any specifically named people.

Trial Examiner Bokat: In order that the record may be clear as to what we are talking about, because I don't believe there is any reference in the record that the Board has supplied any information to the respondent, let the record show that early in the hearing, in an off-the-record discussion the Ex-

(Testimony of W. A. McGowan.)

aminer had with Mr. Ball, Mr. Walker and Mr. Landye, I believe I asked Mr. Walker,—at least someone did,—whether or not the Board was going to introduce or adduce some proof concerning independent 8-1 statements, and Mr. Walker indicated that he probably had 2 or 3 witnesses on that point. Is that correct?

Mr. Walker: That is correct.

Trial Examiner Bokat: Mr. Ball at that time interjected with the statement that he had not received any advance information, because the complaint did not specifically allege any independent 8-1 matter, but merely had a phrase which stated “and by various other acts” did interfere with the rights of the employees.

At my request, Mr. Walker promised to supply Mr. Ball with certain information as to the names of the supervisors who were [422] allegedly involved in the so-called independent 8-1 statements or incidents. Is that correct?

Mr. Walker: That is correct.

Mr. Ball: Yes, but I didn't understand that the Examiner limited it to the providing of the names, but with information such as a bill of particulars would furnish,——

Trial Examiner Bokat: Certain information?

Mr. Ball: Yes.

Trial Examiner Bokat: I now learn for the first time that you have received the names of the supervisors who may have been involved.

(Testimony of W. A. McGowan.)

Mr. Ball: At that time it was provided that Mr. Walker should give me the names of the parties who made the statements, and I understood, the names of the parties to whom the statements were made.

Mr. Walker: No, that is not correct.

Mr. Ball: Let me put it this way: Mr. Walker was asked whether he would give me the names of the parties to whom the statements were made, and he stated that he didn't have the information correctly assembled at that time.

Trial Examiner Bokat: All right, what is the point that you wish to make?

Mr. Ball: The point is that Mr. McGowan was called without any advance information on my part as to whom he is supposed to have made any statements. Therefore, I am going to ask to [423] reserve cross examination, if necessary, until I have had an opportunity to examine into the facts.

Trial Examiner Bokat: I was going to make the suggestion that, after the direct examination of Mr. McGowan is concluded, you be given an opportunity to discuss with him any matter which you may desire to discuss, and, if you desire, to put off your examination until a later time in order that you may have an opportunity to conduct your cross examination, if you want to call it that.

Q. (Mr. Walker, continuing) Approximately how many employees are under your charge?

A. That varies with the different seasons of the year.

(Testimony of W. A. McGowan.)

Q. What is approximately the low point?

A. I would say around 45.

Q. How many do you have at the high point?

A. Around 54.

Q. What are your duties as a floor supervisor; is that correct; is that your correct designation?

A. That is right.

Mr. Ball: Will you speak more loudly, please?

The Witness: I will try. You wanted to know what my duties are as floor supervisor?

Q. (Mr. Walker, continuing) Yes.

A. I have charge of the people on the floor, and take charge of all the merchandise coming in and out, and have personal super- [424] vision over everyone that is on the floor.

Q. You are responsible for seeing that there is a flow of goods to be worked on by the people in your department, to see that it gets into the department, and also responsible for the flow of the goods out again?

Mr. Ball: What is the purpose of this? What do you want to prove?

Trial Examiner Bokar: He just wants to find out what his duties are.

A. As to the merchandise that comes onto the floor, I have no control of that; as to the flow off, that is taken care of by the amount of receipts that we receive on the floor any day of the week.

Q. (Mr. Walker, continuing) Now, do you re-

(Testimony of W. A. McGowan.)

call the incident of the strike taking place at the store on December 7? A. Yes.

Q. Who is your immediate superior? Whom are you responsible to?

A. Mr. Brooks at the present time.

Trial Examiner Bokat: How do you spell that?

The Witness: Brooks, B-r-o-o-k-s (spelling).

Q. (Mr. Walker, continuing) What is his position?

A. He is the operating superintendent; superintendent of operations: let me correct that, please.

Q. Within the week immediately following December 7, did you [425] call on some of the employees in your department? A. Yes.

Q. Who asked you to do that?

A. Why, I was given a list of some of the employees in my department, to contact them by telephone, which I did.

Q. Who gave you the list?

A. It was furnished to me by my superior at that time.

Trial Examiner Bokat: Who was your superior, Mr. Brooks?

The Witness: No, Mr. Brooks was not here; it was Mr. Robinson.

Trial Examiner Bokat: Who was Mr. Robinson?

The Witness: Mr. Robinson was my superior. He was there at that time.

(Testimony of W. A. McGowan.)

Q. (Mr. Walker, continuing) What did he tell you?

A. What he told me was to get in contact with these people over the phone.

Q. What else did he tell you?

A. The wording I was to give to them was that, as they had not appeared for work on Saturday, I was to inform them that the Company was going to operate on Monday as usual, and that their job was waiting for them if they cared to come back.

Q. Who furnished you with the wording of that?

A. Mr. Robinson.

Q. Did you call them?

A. Yes, I called them.

Q. As you talked to them over the phone, did you read off the [426] slip?

A. Off the slip, yes.

Q. What department were the employees in that were notified, according to this list given you by Mr. Robinson?

Trial Examiner Bokar: Will you read the previous answer, as to what he read off?

(Thereupon the answer of the witness referred to was read aloud by the reporter as follows:

“A. The wording I was to give to them was that, as they had not appeared for work on Saturday, I was to inform them that the Company was going to operate on Monday as usual,

(Testimony of W. A. McGowan.)

and that their jobs was waiting for them if they cared to come back'')

Q. (Mr. Walker, continuing) When you started making these calls, what day was it?

A. The strike was on Saturday.

Q. When did you make your calls?

A. On Sunday, after the first day of the strike.

Trial Examiner Bokat: That would be on what date?

Mr. Ball: Let the record show that the strike occurred on Saturday, the 7th.

Trial Examiner Bokat: And the Sunday that you are referring to is Sunday the 8th?

The Witness: That is correct.

Q. (Mr. Walker, continuing) Did you complete all of your calls [427] on Sunday?

A. No, I couldn't get in touch with all of them on Sunday, and I had to call some on Monday.

Q. Did you do that?

A. Yes; and there were some that I couldn't get in touch with.

Q. What did you tell those people that you called over the phone? A. The same thing.

Q. I mean those that you called on Monday?

A. Yes, that is right; the same thing. I read from the list that I had on Sunday.

Trial Examiner Bokat: In other words, you told them that their job was waiting for them if they wanted to come back to work?

(Testimony of W. A. McGowan.)

The Witness: That is right.

Q. (Mr. Walker, continuing) Did you make any other contacts with any of the employees besides?

A. Besides telephoning?

Q. Yes. A. I made one call.

Q. A personal call? A. Yes.

Q. Whom did you call on?

A. That was to Mr. Robert Fullerton.

Q. And where did you call on him? [428]

A. At his home.

Q. When was that?

A. Two or three days later. It was during the week; I couldn't recall exactly the date.

Q. About what time of day did you call on him?

A. It was about eight o'clock in the evening.

Q. About how long did the call last?

A. I would say it was approximately one hour; I couldn't say for sure.

Q. Had you contacted him previously by phone?

A. No, I had not.

Q. Was he on the list?

A. No, he was not on my list.

Q. Who told you to see Mr. Fullerton?

A. Nobody, sir.

Trial Examiner Bokar: Was he on strike?

The Witness: Yes, he was out.

Mr. Ball: I am going to object to the question whether he was on strike. He may not have been there for various other reasons, sickness, or various other things.

(Testimony of W. A. McGowan.)

Trial Examiner Bokat: I am willing to modify my question. He was not there working Saturday, and he was out for a few days?

The Witness: Yes, sir.

Trial Examiner Bokat: All right. [429]

Q. (Mr. Walker) Did you bring anything out with you? A. I had one bottle of beer.

Q. Did you have a conversation with Mr. Fullerton?

A. Yes, my wife and I had a conversation with Mr. and Mrs. Fullerton.

Q. What was it?

A. Just a social conversation.

Q. Anything about the events that were taking place, or about having not been to work previously?

A. That was not brought up until later.

Q. What did you say about that?

A. I didn't say anything about it.

Mr. Ball: The respondent now objects to any further discussion of what took place on this occasion. As the testimony so far indicates, this was merely a social call between personal friends, and not at the instruction or solicitation of any responsible officer of Montgomery Ward, the respondent in this case, and it is therefore incompetent, irrelevant and immaterial, and doesn't tend to prove or disprove any issue in this case.

Trial Examiner Bokat: I will let it stand for what it is worth. I think you are making a good

(Testimony of W. A. McGowan.)

point, however, that is, so far as the social call is concerned. I don't know what effect it would have. Perhaps your objection is premature.

Mr. Ball: May we have a further objection to what may have been said at this meeting? [430]

Trial Examiner Bokar: Yes, I will give you a standing objection.

Q. (Mr. Walker, continuing) Did you tell Mr. Fullerton where you had been before you arrived at their house?

A. No, sir; I did not. So far as I know, I did not.

Trial Examiner Bokar: Is he a friend of yours?

The Witness: I consider him as such, yes, sir.

Trial Examiner Bokar: This was purely a social call, as far as you were concerned? A. Yes.

Q. (Mr. Walker, continuing) Had you called on anyone else that evening before you came to see Mr. Fullerton?

A. Not that I know of, sir.

Q. Did you call on anybody after you left Mr. Fullerton? A. No, sir.

Q. Do you know a Bill Lund? A. Who?

Q. Do you know Bill Hough?

Trial Examiner Bokar: How do you spell it?

Mr. Walker: H-o-u-g-h (spelling).

A. Yes, sir.

Q. (Mr. Walker, continuing) Do you know Bill Lund?

Trial Examiner Bokar: How do you spell that?

(Testimony of W. A. McGowan.)

Mr. Walker: L-u-n-d (spelling).

A. No, I do not. [431]

Q. (Mr. Walker, continuing) Do you know John Long?

Trial Examiner Bokat: L-o-n-g (spelling)?

Mr. Walker: Yes.

A. Yes.

Q. (Mr. Walker, continuing) Do you know a man by the name of Beede? A. Yes.

Trial Examiner Bokat: How do you spell that?

Mr. Walker: B-e-e-d-e (spelling).

Trial Examiner Bokat: You said "yes"?

The Witness: Yes.

Q. (Mr. Walker, continuing) Did you call on either of those persons? A. No.

Q. Did anybody else,—strike that. Did any of those persons call on you?

A. They contacted me. I had several persons contact me over the 'phone, wanting to see me.

Q. Did they see you?

Trial Examiner Bokat: One, was it not?

The Witness: Several.

Trial Examiner Bokat: Did they call to see you?

The Witness: Several contacted me over the telephone and wanted to see me.

Trial Examiner Bokat: Did they call to see you?

[432]

The Witness: Yes.

Trial Examiner Bokat: When you say "several", are you referring to the people mentioned by Mr.

(Testimony of W. A. McGowan.)

Walker, the Board's attorney, or are you referring to people other than those?

The Witness: Other than those.

Trial Examiner Bokat: All right.

Q. (Mr. Walker, continuing) Did anybody else that I mentioned call on you?

A. Mr. Hough.

Q. Anyone else? A. Johnny Long.

Q. Any of the others?

A. That you read off?

Q. Yes. A. No.

Q. Now, have you related everything that you said to Mr. Fullerton at his house concerning his not having been to work?

Mr. Ball: The same objection as to the previous questions.

Trial Examiner Bokat: Overruled.

The Witness: Will you repeat that, please?

Trial Examiner Bokat: Yes, will you read the question back, Mr. Nelson?

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Not in so far,—now, what is the question?

[433]

Q. (Mr. Walker, continuing) Have you related everything that you said to Mr. Fullerton at his house concerning his not having been to work?

A. In so far as his not having been to work, yes.

Q. What was that?

(Testimony of W. A. McGowan.)

A. In so far as me saying anything about him being to work, I have related everything.

Q. Did you tell him that you had been going around to some of the men in your department and talking to those whom you felt you could trust?

A. No, I made no such statement.

Q. Did you tell him that you were going around to see the men for the purpose of getting them back to work?

Mr. Ball: I want to interpose the objection that this man is called as the Board's witness, and that counsel is obviously arguing with his own witness.

Trial Examiner Bokar: Do you intend to produce witnesses to impeach this witness on the particular questions that you are now asking him?

Mr. Walker: Yes.

Mr. Ball: We object to any such a procedure as that.

Trial Examiner Bokar: Haven't you got the cart before the horse, then? I mean, I don't know your procedure in Oregon, but it seems to me that, in advance of your producing your own proof, that you should have the testimony of your own [434] witness, instead of asking Respondent's witness about it now and, if he says "no", then you calling your own witness to testify that he did have such a conversation. It seems to me,—I don't know, but if that is the procedure followed in Oregon, I will have to permit it.

(Testimony of W. A. McGowan.)

Mr. Ball: We object to any such procedure as being unfair and jeopardizing the the rights that we have to a fair trial, especially in view of the circumstances already brought out in the record.

Mr. Landye: We have what we call an adverse witness in this State whereby you can call an adverse witness before the Court ahead of time, and then he can cross examine him.

Trial Examiner Bokar: I understand that,—if you have an adverse witness, you may or can have the right to cross examine that witness and ask him leading questions, but to ask him whether or not he had certain conversations in advance of calling your own witnesses is something that I am not sure is necessarily followed by your statute.

Mr. Ball: We would also interpose this,—that this Board is not and should not be bound by any Oregon statute. There is no rule that requires the Labor Board to follow the state statutes involved.

Trial Examiner Bokar: No, I understand that. I generally do follow the local statutes in regard to certain rules that are commonly understood and followed in any particular juris- [435] diction, but——

Mr. Landye: (Interposing) Well, in a situation such as this, we do not call, under the adverse statute, we are not calling this witness with the idea that we may have to impeach him. We don't know. It may be that this witness will tell the truth as we

(Testimony of W. A. McGowan.)

see it, and it will not be necessary to do it.

Trial Examiner Bokat: "As you see it"—that is the point.

Mr. Ball: Now, let's move to strike out any question of whether or not this witness is going to tell the truth as they see it.

Trial Examiner Bokat: As they see it. I will let that stand in that way.

Mr. Ball: And it is pointed out that this is a totally unnecessary proceeding, because the Board, if it has any witnesses as to what Mr. McGowan said, can produce those in the ordinary presentation of its case, thus giving the respondent the opportunity to investigate into the truth of the charges thus indicated.

Trial Examiner Bokat: I am afraid I will have to insist, Mr. Walker, that you put on your witnesses in the ordinary course, and have them testify and let the respondent call its own witness and either admit or deny what took place. I think I would prefer it that way.

Mr. Walker: That is agreeable to me. I only called this witness in the hope that,— [436]

Trial Examiner Bokat: (Interposing) —it might save some time?

Mr. Walker: (Continuing) Obviate the necessity of calling six or seven other witnesses, and take that much more time.

Trial Examiner Bokat: Evidently you will have to call them, anyway, according to the nature of the answers already given. I am going to sustain

(Testimony of W. A. McGowan.)

the respondent's objection to this method of procedure, and ask you to establish any conversations *an* already established by the Board's witnesses, and put on your own witnesses to that effect.

Mr. Walker: Very well.

Trial Examiner Bokat: Do you have any further questions of this witness at this time?

Mr. Ball: You understand that we are not making an objection to the examination of this man?

Trial Examiner Bokat: Oh, I understand.

Mr. Ball: But it is to the results that they intend to produce by it. They can proceed with their examination of Mr. McGowan as far as the respondent is concerned.

Trial Examiner Bokat: I understand.

Mr. Walker: May we have a recess, then, while I contact these other witnesses?

Trial Examiner Bokat: Yes, yes.

Before you do that, I assume that you don't wish to question the witness at this time. Do you want to reserve the right to [437] coordinate it?

Mr. Ball: I would like to cross examine up to the point that the examination on direct has gone at this point.

Trial Examiner Bokat: Are you ready to proceed on that?

Mr. Ball: Yes.

Cross Examination

Q. (Mr. Ball) Mr. McGowan, have you ever had

(Testimony of W. A. McGowan.)

any conversation with me on any matter pertaining to the charges before this court? A. No, sir.

Q. What acquaintance have you with me?

A. I met you the first time yesterday morning.

Mr. Ball: Will you mark this, please?

(Whereupon the document hereinabove referred to was marked for identification as Respondent's Exhibit 7.)

Q. (Mr. Ball, continuing) I hand you what the reporter has marked Respondent's No. 7, and ask you if you recognize what it is?

A. This is the——

Mr. Walker: (Interposing) Just a moment. May I request that the witness be instructed to answer that question "yes" or "no"?

A. Yes.

Q. (Mr. Ball, continuing) All right, what is it?

A. This—— [438]

Mr. Walker: (Interposing) Just a moment. Doesn't the document speak for itself?

Trial Examiner Bokat: Well, he is just trying to identify it now. You can look at it, if you want to.

Mr. Reporter, will you read the question?

(Whereupon the question referred to was read as follows:

"Q. (Mr. Ball) All right, what is it?")

A. This is the slip that was handed to me to make the telephone calls from, Sunday morning of the 8th.

(Testimony of W. A. McGowan.)

Q. (Mr. Ball, continuing) Who gave you that slip?
A. Mr. Robinson.

Q. What did he say to you about that slip?

A. He told me that I was to follow the slip out to the letter, and under no circumstances was I to put any of my own personal talk or anything else into it.

Q. And did you follow that in your conversations with the telephone calls and calls you made on company instructions?
A. I did.

Q. Did you follow that in any other contacts you may have had with the employees?

A. I did.

Mr. Ball: I now offer Respondent's Exhibit No. 7 into evidence in connection with the cross examination of Board's witness McGowan.

Trial Examiner Bokar: Is there any objection?

[439]

Mr. Walker: No objection.

Trial Examiner Bokar: There being no objection, it may be received and marked in evidence.

(Whereupon the document heretofore marked Respondent's Exhibit No. 7 for identification was received in evidence.)

(Testimony of W. A. McGowan.)

RESPONDENT'S EXHIBIT No. 7
TRANSCRIPT OF TELEPHONE CONVERSA-
TION TO EMPLOYEES

"Good evening Miss, Mrs. or Mr.

This is Mr. speaking.

Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in."

(When you have made the above statement, listen for the employee's reaction to it. Do not make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not in any way insist that the employee should come to work or intimate that their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come on.)

Mr. Landye: I have a question on redirect in regard to the exhibit. May I ask that now?

Trial Examiner Bokat: Yes, you may.

(Testimony of W. A. McGowan.)

Redirect Examination

Q. (Mr. Landye) Showing you respondent's exhibit 7, Mr. McGowan,—has that slip been in your possession all of the time since the first part of September, in your personal possession?

A. No.

Q. Were you given one that you kept yourself?

A. I was given one that I turned in to Mr. Robinson.

Q. Did you turn that back?

A. I turned that back after the telephone calls were made.

Q. You don't know, then, whether that is the slip that you have there that you actually called from then? A. I can't swear to that, no.

Mr. Ball: I want to make it clear that I don't mean that this is the exact slip. I have no means of identifying it.

Mr. Landye: I would like to find out what it is. [440]

Trial Examiner Bokar: Go ahead. No one is preventing you from cross examining to find out if there are other slips.

Q. (Mr. Landye, continuing) You can't tell whether that is the actual slip that you called from or not, can you?

A. That is, on this slip of paper, no.

Q. I see. And how long,—the slip that was given to you, did you turn it back at the end of each day?

A. No; I turned that back on Monday night.

(Testimony of W. A. McGowan.)

Q. You kept it from Saturday to Monday?

A. I kept it from Sunday morning to Monday night.

Q. You started calling Sunday morning?

A. That is right.

Q. From the plant,—I mean from the store?

A. That is right.

Q. I see. Were you given any other slips?

A. No, just the list of telephone numbers was all.

Q. Did anyone else have any conversations with you besides Mr. Robinson as to what you should call about on the phone?

A. No, sir; Mr. Robinson gave me my orders direct.

Q. Did you call up everybody on the floor during the——

A. (Interposing) No, I couldn't possibly have done that, and there was some on my slip that I couldn't get in contact with.

Mr. Landye: At this time, I will have to make a motion to strike the Exhibit upon the grounds that it hasn't been properly identified. [441]

Trial Examiner Bokat: May I see it?

Q. (Trial Examiner Bokat) To the best of your recollection, is Board's Exhibit 7,—Respondent's Exhibit 7, identical with the instructions that were given to you by Mr. Robinson?

Will you look at it carefully and then answer that question, whether it is or not? A. Yes.

(Testimony of W. A. McGowan.)

Trial Examiner Bokat: I will have to overrule the objection.

Mr. Landye: Exception.

Q. (Mr. Landye, continuing) Who told you to report down to the store on Monday morning?

A. Who told me to?

Q. Yes. A. Mr. Robinson.

Q. Mr. Robinson? A. Yes, sir.

Q. Do you usually work on Sunday?

A. No, not usually.

Q. Well, how many times did you work on Sunday in the past year before this?

A. Well, that is very hard to bring out.

Q. Two or three, or five, or fifteen?

A. It is according to the seasons of the year. In some cases, we will work maybe one Sunday out of three months and then around Christmas time we may work three Sundays or four Sundays.

Q. Did you do any work on Sunday besides calling up these [442] various people?

A. Yes, plenty.

Q. I see. Now, when Mr. Robinson gave you Respondent's Exhibit 7, did he just hand you the slip?

A. No. He handed me this slip and another slip with the names of the people on it.

Q. Yes.

A. And the telephone numbers.

Q. He handed you one slip, Respondent's Exhibit 7? A. That is right.

(Testimony of W. A. McGowan.)

Q. And then another slip with phone numbers on it? A. That is right.

Trial Examiner Bokat: Names and telephone numbers?

The Witness: That is right.

Q. (Mr. Landye) Names and telephone numbers? A. That is right.

Q. Did he say anything else?

A. Yes; he told us that we were to contact these people by phone, and that we were to follow out these instructions as to how to telephone to them, to the letter.

Q. (Trial Examiner Bokat) You say "he told us"?

A. Well, in other words, other people than myself were at that meeting and called on to do the telephoning.

Q. Who were the other people?

A. They were some more of the operating superintendents. [443]

Q. And they received slips similar to the ones that you received?

A. Similar to the ones that I received.

Q. And instructions similar to yours at the same time? A. That is right.

Q. (Mr. Landye) This was at a meeting that was called of the Supervisors?

A. They called a meeting of the supervisors at Mr. Robinson's office.

Q. How long did that last?

(Testimony of W. A. McGowan.)

A. Very short.

Q. About how long?

A. Five or ten minutes.

Q. And in ten minutes, that is the only thing that you were told?

A. That is the only thing we were told; five or ten minutes, I say.

Q. And in five minutes, all you were handed was two papers and told to follow that out to the letter?

A. That is right.

Q. And that is all that you were told by Mr. Robinson?

A. That is all Mr. Robinson told me.

Mr. Landye: I see. That is all.

Trial Examiner Bokar: Anything else, Mr. Ball?

Mr. Ball: I think not. [444]

Trial Examiner Bokar: Do you have any questions, Mr. Walker?

Mr. Walker: Yes.

Redirect Examination

Q. (Mr. Walker) Had you ever been to Mr. Fullerton's house prior to the time you and your wife went out there? A. Several times.

Q. How often?

A. Three or four times?

Q. Three or four times? A. Yes, sir.

Q. In the course of a year, do you mean?

A. In the course of a year.

(Testimony of W. A. McGowan.)

Recross Examination

Q. (Mr. Ball) Have you ever drunk any beer with Mr. Fullerton before? A. Plenty.

Mr. Ball: That is all.

(Witness excused)

Trial Examiner Bokat: We will suspend for ten minutes at this time.

(Thereupon, at this time a short recess was taken, after which proceedings were resumed as follows:)

[445]

(Whereupon at 4:40 p. m., pursuant to afternoon recess, the following proceedings were had:)

Trial Examiner Bokat: The hearing is now in session.

WILLIAM EARLE HOUGH,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Bokat: Give your full time and address to the reporter.

The Witness: William Earle Hough, 6825 Northeast Stanton.

Q. (Mr. Walker) Have you ever been employed at Montgomery Ward, Mr. Hough? A. Yes.

(Testimony of William Earle Hough.)

Q. How long had you worked there?

A. About two years.

Q. When did your employment last end there?

A. December 7th.

Mr. Ball: Will you speak a little louder, if you please?

The Witness: December 7th.

Q. (Mr. Walker continuing) During the time you worked there, who was your supervisor?

A. W. A. McGowan.

Q. After December 7th, did you see Mr. McGowan at any time? A. Yes.

Q. When? [446]

A. Just about four days after the strike.

Q. Where did you see him?

A. I saw him at his home.

Q. About what time of night was that?

A. About 7:30 or 8 o'clock in the evening.

Q. How did you happen to go to his house that night?

A. Well, he was out to my house,—I didn't happen to be home, but my mother was there; she said he was there and he would like to see me; so I went out to his house and saw him.

Q. When had Mr. McGowan been to your house, with respect to the day you went to his house?

Mr. Ball: I move to strike out of the record what his mother told him about Mr. McGowan's coming, as being hearsay.

(Testimony of William Earle Hough.)

Trial Examiner Bokat: Well, I will merely accept it to show the reason why the witness went to the home of Mr. McGowan. If, as a matter of fact, his mother said that Mr. McGowan had been there, and that he, therefore, went to Mr. McGowan's home, I will merely accept it to show a course of conduct; how he happened to go to Mr. McGowan's house. I don't say it is necessarily binding on the respondent, or proves that Mr. McGowan actually went there. I hope my explanation is clear.

Q. (Mr. Walker continuing) When had Mr. McGowan been to your house, Mr. Hough?

A. I don't remember the exact date; I think it was about [447] three days after the strike.

Mr. Ball: The same objection there; and that it assumes a fact not proven.

Trial Examiner Bokat: When did you receive the message he had been to your house? The day before you went to visit him, the same day, or what?

The Witness: About two or three days after he come to my house I went up to see him.

Trial Examiner Bokat: Two or three days after you received the message and you learned he had been to your house, you went to Mr. McGowan's house?

The Witness: That is right.

Mr. Ball: Of course, for the answer, to the extent the witness said it was after Mr. McGowan came to his house, I move to strike that part as a conclusion of the witness.

(Testimony of William Earle Hough.)

Trial Examiner Bokat: I am referring to the message he received that he had been there.

Q. (Mr. Walker continuing) Now, when you got to Mr. McGowan's house, did you have a talk with him? A. Yes.

Q. What was said?

Mr. Ball: Now, just a minute. At this time, respondent objects to any testimony as to any conversation between this witness and Mr. McGowan, because it appears that it took place under circumstances that were not such as to make the [448] actions or words of Mr. McGowan binding on this respondent; that it is, further, an attempt to impeach statements which were elicited on examination of Mr. McGowan.

Trial Examiner Bokat: I will overrule the objection. You may answer the question.

A. Well, we started out by asking if I wanted to come back?

Mr. Ball: I can't hear you, Mr. Hough.

The Witness: He said if I wanted to come back to work that I didn't have to really go through the picket line. I could come around through the back way of the store. He said some of the boys were coming back. He said he hated to see me out; he would like to see me back. He said he didn't want to see me lose money. We didn't talk all the time about the strike; we started a conversation on other things. But the most important thing was,—I went

(Testimony of William Earle Hough.)

out there to see him about,—was to see whether I should go back to work.

Mr. Ball: I move to strike out those portions of the witness' answer which are his opinions and conclusions as to his reasons for going and the tenor of the conversation. I move to strike out the entire answer as an opinion and conclusion. I move to strike out the answer for the reasons urged in the question eliciting this conversation.

Trial Examiner Bokat: Deny the motion, with certain modifications. After the reporter reads the answer back to me, I will indicate which part I will strike and which I will permit [449] to stand. Read it back to me, please.

(Whereupon the answer referred to was read aloud by the reporter as above recorded.)

Trial Examiner Bokat: From "the most important thing" on, strike that.

Mr. Ball: Let the record show that we add to the objection the further objection that this conversation doesn't tend to prove or disprove any of the issues in this case.

Trial Examiner Bokat: You may be right,—very technically and strictly speaking,—because of the allegations of the complaint. I am referring particularly to the fact that there is no specific allegation of a nature to support testimony of this witness; that is true. All that we have is the phrase, "and by various other acts", that would indicate there might have been other acts of interference, re-

(Testimony of William Earle Hough.)

straint, or coercion,—if this can be considered as such. In view of the fact Board's counsel indicated at the beginning of the hearing that he intended to produce such proof, and inasmuch as I asked Board's counsel to supply certain information to respondent's counsel, I will deny the motion to strike on the ground just stated by Mr. Ball.

Q. (Mr. Walker continuing) Was there any discussion about the strike being in existence?

Mr. Ball: Now, just a minute. I object to the rather leading form of this question here. He is more or less putting [450] the words of the answer in the mouth of the witness. In view of the circumstances, I think you should instruct counsel against leading the witness.

Trial Examiner Bokat: Read the question back.

(Whereupon the last question was read aloud by the reporter as above recorded.)

Trial Examiner Bokat: I will overrule the objection on that.

Mr. Walker: You may answer, Mr. Hough.

The Witness: What was the question again, please?

Trial Examiner Bokat: Read it back.

(Whereupon the question just read was again read aloud by the reporter as above recorded.)

A. Yes, there was.

Q. (Mr. Walker continuing) What was said about that?

Mr. Ball: The same objection,—or the objection,

(Testimony of William Earle Hough.)

rather, that this is a question following a leading question.

Trial Examiner Bokar: Overruled.

The Witness: He said that the store would never go union; that they would lock the store up and send all the books and everything to the Chicago house before they would sign a union contract.

Mr. Ball: I move to strike this out for all the reasons urged previously; the testimony of this witness as to what took place at this conversation.

[451]

Trial Examiner Bokar: Motion denied.

Q. (Mr. Walker continuing) Was there any conversation about Mr. McGowan's connection with the company?

A. Yes. He said that he had a contract with Montgomery Ward & Company, and that if the store closed up he would not be out of a job, because he would still be getting his salary all the time; it didn't make any difference to him whether it went union or not.

Trial Examiner Bogat: It didn't make any difference, what?

The Witness: It didn't make any difference whether they closed up the store or not.

Mr. Ball: I move to strike the answer out, and insert before the answer and after the question the same objections that have been urged.

Trial Examiner Bogat: Objection overruled and motion denied.

(Testimony of William Earle Hough.)

Q. (Mr. Walker continuing) Was there any discussion of any other Montgomery Ward store?

A. Yes.

Mr. Ball: Now, I object consistently here to the leading of this witness by counsel. Why doesn't he ask the witness what was said, and let the witness supply the details, without putting them in his mouth.

Trial Examiner Bokar: I think the question, in the form it was stated, is proper. But, as to the subject matter, I may have some doubts as to its validity. What would other stores [452] of Montgomery Ward have to do with this particular store? I don't see the connection.

Mr. Walker: It is just a general course of conversation relating to the conduct of the company, and also it indicates the extent of the strike affecting other stores.

Mr. Ball: Let me state for the record here, that when Mr. Walker told me what he had in mind to prove as these other acts, it was simply certain conversation urging these people to go back to work. He didn't amplify that it related to any more subject matter than that.

Mr. Walker: That is correct. I told you I didn't do it, because it would be considered evidentiary.

Trial Examiner Bokar: Let me hear the question again.

(Whereupon the question referred to was read aloud by the reporter as above recorded.)

(Testimony of William Earle Hough.)

Trial Examiner Bokat: I will overrule the objection at this time, subject to a later motion to strike, as to the last question.

Q. (Mr. Walker continuing) Have you the question now? A. Yes.

Trial Examiner Bokat: He has already answered. He said, Yes.

Q. (Mr. Walker continuing) What was it?

A. Well,—

Mr. Ball: (Interrupting) Objection: that this doesn't [453] tend to prove or disprove any of the issues in this case.

Trial Examiner Bokat: Subject to some connection with the issues.

The Witness: We started talking about the Spokane house. He asked me if they had pickets around Spokane house, and I said I didn't know. He said, "Well, I don't think there are. If I was you fellows. I would all chip in and buy a tank of gas and drive up there and see if there is any pickets around the Spokane house. I don't think there are." That is all that was said.

Trial Examiner Bokat: I will grant the motion to strike, considering there was a standing motion to strike. In other words, I agree with counsel that the last answer of the witness would not tend to prove or disprove any of the issues of the complaint.

Mr. Walker: Well, except for this, Mr. Examiner: If the Spokane store was struck, and if there

(Testimony of William Earle Hough.)

were pickets around there, or if there were not,—in either event, the inducing or urging of persons on strike to go to observe the conduct or lack of strike conduct, at another store, is offered for the purpose of discouraging union activity, breaking the strike, or bringing about a back-to-work movement, and urging employees to abandon unions and to go through picket lines.

Trial Examiner Bokar: I don't want to expand the issues in this case more than absolutely necessary. I will stick to my [454] original ruling. Merely strike, to make the record clear, the last answer given by the witness.

Q. (Mr. Walker continuing) Do you know a Mr. Beede? A. Yes, I do.

Q. Was there any further conversation with Mr. McGowan that evening?

Mr. Ball: The same objection.

Trial Examiner Bokar: Overruled.

The Witness: Yes. He told us about Beede and Jack Walker,—those are the two boys working on our floor,—coming back to work. He said they were coming around through the back entrance of the door. They didn't have to go through by the picket line. And before I left, he said he would like to have me get hold of as many fellows as I could and talk to them and tell them they could come in the back door and they would not have to go through the picket line.

Mr. Ball: I move to strike, for the same reasons.

(Testimony of William Earle Hough.)

Trial Examiner Bokat: Motion denied.

Q. (Mr. Walker continuing) How did that conversation that evening, between yourself and Mr. McGowan, end?

A. He asked me, he says he would like to see me come back, but I didn't give him an answer whether I would or would not come back the next day. That is all there was to it.

Mr. Walker: That is all.

Trial Examiner Bokat: Cross examine, Mr. Ball.

[455]

Cross Examination

Q. (Mr. Ball) Who suggested that you testify to this effect at this trial?

Mr. Walker: Now, just a minute. I object to that.

Trial Examiner Bokat: Yes. Objection sustained as to form. Reframe the question.

Q. (Mr. Ball) Who did you first talk to about your conversation with Mr. McGowan?

A. Who did I first talk to?

Q. Yes. A. Mr. Walker.

Q. How did Mr. Walker happen to talk to you about this? Did you come to him, or did he come to you, or what?

A. I didn't come to him, no.

Q. How did it happen that you talked to Mr. Walker about this?

A. One of our strikers told me to come up and see Mr. Walker.

(Testimony of William Earle Hough.)

Q. Who was this? A. Mr. Malloy.

Q. You talked to him about this before?

A. Yes, I did.

Q. Had he come to you and asked you about it?

A. Yes.

Q. He had come and asked you if you had any tale to tell of this character?

A. He didn't ask me, no. [456]

Q. What did he say then?

A. He asked me to come up to Walker's office.

Q. How did you ever bring this subject up?

A. It must have slipped out some way.

Q. Isn't it a fact, somebody came around and asked you if you couldn't tell just such a tale as this?

Mr. Walker: I object to that.

Trial Examiner Bokat: Overruled.

The Witness: What was the question again?

Trial Examiner Bokat: Read the question.

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. No, he didn't ask me that way; no.

Q. What did he say to you then?

A. I done it on my own ability.

Q. The question is, Didn't somebody come and ask you if any such incident as this had happened to you?

A. He asked me to come up to the office and speak to Mr. Walker.

(Testimony of William Earle Hough.)

Q. When was the first time you had a conversation with anybody about the conversation with Mr. McGowan?

Mr. Walker: Object to that. It is a compound question.

Trial Examiner Bokat: Break it up.

Q. (Mr. Ball continuing) Who was the first person you talked to about the conversation with Mr. McGowan? [457] A. Mr. Malloy.

Q. When was that?

A. About a month, or something like that, ago.

Q. About a month ago? A. Yes.

Q. More than three months after this happened then? A. Something like that, yes.

Q. How did you happen to talk about it with Mr. Malloy.

A. I happened to be telling him about it; that's all.

Trial Examiner Bokat: Did you voluntarily tell him what happened, or did he ask you?

A. The Witness: I voluntarily told him what happened.

Trial Examiner Bokat: You mean you told him what you have already testified to here?

The Witness: Yes.

Q. (Mr. Ball continuing) In what kind of a place did this conversation with Mr. Malloy take place? A. Down on the picket line.

Q. How did the subject come up?

(Testimony of William Earle Hough.)

A. Well, I just happened to start it.

Q. Who is Mr. Malloy?

A. He is a picket captain.

Q. Isn't it a fact that Mr. Malloy went, at that time, to a number of you and asked you if you could testify to something of this kind? [458]

A. No; he didn't ask us that.

Q. He suggested that he was interested in such matters?

Mr. Landye: That question has already been asked and answered. I object to it.

Trial Examiner Bokat: Well, I will let it stand. It is cross examination.

The Witness: We done it of our own ability.

Q. (Mr. Ball continuing) Answer the question.

Trial Examiner Bokat: Read the question, please.

(Whereupon the question was read aloud by the reporter as above recorded.)

Q. (Mr. Ball continuing) Did he?

A. Did he what?

Q. Suggest that he would be interested in hearing such tales from you?

A. I imagine he would, yes.

Q. Did he suggest to you that he would?

A. No.

Q. Isn't it a fact that there had been literature circulated by the strike committee of the union asking for the production of these stories?

A. Well, it is hard to answer that. I told you

(Testimony of William Earle Hough.)

before, I went and told him on my own ability; to help out.

Q. To help out. How did you know they wanted that; that that would help out? 459]

A. He was wrong in doing that.

Q. How did you think he would be interested in that? What made you think that?

A. Well,—

Q. (Interrupting) Look me in the eye and tell me the answer to that question.

Mr. Walker: Just a minute now.

Trial Examiner Bokar: (Rapping for order among the spectators) Quiet, please.

Mr. Landye: For a few minutes here he has been asking back and forth the same questions, and most of them he asked were answered. Now, he is merely more or less trying to bully the witness. I think we should have a little order here.

Trial Examiner Bokar: I will see that every witness on the witness stand here is protected and given an opportunity to answer the question.

I do think you have asked two or three questions before. Let him have the first one; let him have them one at a time.

Q. (Mr. Ball continuing) When did you first learn that charges of unfair labor practice had been filed against the company?

A. When did I learn?

Q. Yes. A. When we were out on strike.

(Testimony of William Earle Hough.)

Mr. Ball: Let the record show that the witness has been sitting here with a smile on his face. [460]

Mr. Walker: Well, now, just a minute. Let the record also show that counsel has been shaking his finger in the witness' face and shouting at him.

Trial Examiner Bokat: I don't know if there is any objection to the witness smiling. I want the record to fairly reflect what is taking place.

Mr. Ball: Now, will you read the last question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

Q. (Mr. Ball continuing) When was the first time?

A. Well, it was when we went out; about two or three weeks after the strike.

Trial Examiner Bokat: I don't believe the witness understands the question.

You know what is meant by charges of unfair labor practice being filed with the National Labor Relations Board?

The Witness: I think I do, yes.

Trial Examiner Bokat: Did you know when those were filed, or why?

The Witness: No.

Trial Examiner Bokat: Do you know?

The Witness: No, I don't.

Trial Examiner Bokat: All right.

Q. (Mr. Ball continuing) Now, how many times have you been to Mr. McGowan's house? [461]

A. Once.

(Testimony of William Earle Hough.)

Q. You only came out to his house once?

A. That is right.

Q. You didn't come out a second time?

A. No.

Q. When was it that you first got the idea that this conversation with Mr. McGowan might have some significance in a charge against this company?

A. Well, when I left Mr. McGowan's house, he kind of mentioned it to me to keep it under my hat; not to say anything about it.

Mr. Ball: I move to strike out the answer as not responsive; and I move to instruct the witness to answer when it was that he first learned that such a story, told to somebody else, might have some significance in charges brought against this company.

Mr. Landye: It may very well be in the witness' mind, as he indicated, when Mr. McGowan told him to keep it under his hat,—that is when he suspected it was wrong.

Trial Examiner Bokat: I will let it stand as a partial answer; but I will have the original question put back to the witness.

(Whereupon the last question was read aloud by the reporter as above recorded.)

Trial Examiner Bokat: If you ever did have that idea, that it would have any significance. [462]

The Witness:: No, I didn't.

Mr. Ball: I didn't hear the answer.

The Witness: No.

(Testimony of William Earle Hough.)

Trial Examiner Bokat: I think the witness is obviously confused. Please read the question again.

(Whereupon the question previously read was read again aloud by the reporter as above recorded.)

Trial Examiner Bokat: And I have added, of my own accord, to that question,—If you ever did have such an idea.

The Witness: Well, I don't think there is anything wrong in going out to see him; but him coming out to my house to see me and asking me to come back to work,——

Trial Examiner Bokat: Obviously the witness does not understand the question. You will have to develop it.

Mr. Ball: I move to strike the answer as not responsive.

Trial Examiner Bokat: Yes. [463]

Q. (Mr. Ball, continuing) How many days have you been on the picket line?

A. How many days have I been on the picket line?

Q. Yes.

A. Well, up until about two weeks ago, I have been on the picket line about every day.

Q. How long has Mr. Malloy been your picket captain? Has he been your picket captain all the time?

(Testimony of William Earle Hough.)

A. Ever since the strike began, up to two weeks ago.

Q. You had seen Mr. Malloy practically every day since this strike had started, or since the strike has taken place? A. That is right.

Q. What did Mr. Malloy say to you when he told you about this incident?

Mr. Walker: Just a minute, I will object to that.

Trial Examiner Bokst: Overruled.

A. I can't remember what the exact words were, just like any conversation at all; he didn't say anything important.

Q. (Mr. Ball, continuing) Did he tell you to come to see Mr. Walker at that time?

A. Not at that time, no.

Q. When did he tell you to see Mr. Walker?

A. About two days ago.

Q. Did he make some notation at the time that he first told you this, from some paper of some kind? [464] A. Who?

Q. Mr. Malloy?

A. Two days ago when he asked me?

Q. The first time when you told him this story?

A. No, he did not.

Q. When was it that he asked you to come to see Mr. Walker? A. Oh, about two days ago.

Q. What was the reason that he wanted you to see Mr. Walker? What was the reason that he gave?

(Testimony of William Earle Hough.)

A. He wanted me to tell the conversation that I had with Mr. McGowan.

Q. What were your exact duties at Montgomery Ward? A. Examiner.

Q. In what departments?

A. Fifth floor, divisions 68 and 85.

Q. Are you on any of these strike committees? Or are you a member of a union organization in an active way? A. No.

Q. You have been on the picket line every day?

A. Yes.

Q. Now, how long did that conversation with Mr. McGowan take? A. How long did it take?

Q. Yes. A. When I was out to his house?

Q. Yes. [465]

A. Until about three o'clock in the morning.

Q. From what time?

A. From about seven.

Q. From seven o'clock in the evening until three o'clock in the morning? A. Yes, sir.

Q. What were the other subjects that you talked about?

A. I can't remember all what it was.

Q. You don't remember,—you can't remember what you were talking about from seven o'clock in the evening until three o'clock in the morning?

A. It wasn't very important; the war and things like that.

Q. Can you tell me about anything else you talked about?

(Testimony of William Earle Hough.)

A. About some of the businesses, other stores, about his job, how long he had been with the company, and so on.

Q. You are now repeating more or less what you testified about on direct examination?

A. I know that we talked about the strike and other things.

Q. You can remember exactly the things you testified to, although you can't remember anything else that you talked about over these several hours?

A. I told you.

Q. That is right, is it? A. Yes.

Q. Was there any other person present at Mr. McGowan's house [466] while you were there?

A. Yes.

Q. Who? A. Johnny Long.

Q. Who else? A. Mrs. McGowan.

Q. Who else? A. Mrs. Long.

Q. Who else? A. That is all.

Q. What did you do during that time? Did you eat something or drink something?

A. Yes, we had a few drinks.

Trial Examiner Bokar: Were the other people there as long as you were there?

The Witness: Yes. We all left at the same time.

Q. (Mr. Ball, continuing) And any conversation that you had in Mr. McGowan's house would have been in the presence of these other people?

A. Well, I arrived first, and Mr. McGowan first talked to me about the first conversation; that is, the

(Testimony of William Earle Hough.)

first conversation was about the strike, and then Mr. Long arrived while we were talking there, about 10 or 15 minutes later.

Trial Examiner Bokst: What you said, was that said in the presence of Mr. Long, or did it happen after Mr. Long came, or [467] before?

The Witness: No. We started all over again when he came.

Q. (Mr. Ball, continuing) Mrs. Long was there?

A. Yes.

Q. And Mrs. McGowan was there, too?

A. Yes.

Q. Now, you had been on the picket line before you had gone to Mr. McGowan's house that evening?

A. That is right.

Q. Were there pickets on all sides of the house at that time?

A. On all sides of the house?

Q. Yes.

A. What do you mean by that?

Q. Doesn't the picket line supposedly run around the entire establishment?

A. It runs around the front of the building.

Q. When Mr. McGowan said that you could come in the back way and you wouldn't be going through the picket line, what did you say?

A. I told him I would think it over. I didn't give him any definite answer. I told him that I would think it over.

(Testimony of William Earle Hough.)

Trial Examiner Bokst: Was there actually a picket line at the back entrance?

The Witness: No, but you had to go through the picket line in order to get to the back entrance.

[468]

Q. (Mr. Ball, continuing) So you had to go through the picket line to get to the back entrance?

A. Yes.

Q. You knew that at the time that he told you this?

A. Yes.

Q. And you didn't say anything to Mr. McGowan when he suggested that you could go in through the back entrance?

A. Well, there is also another way. You can crawl around the hill and go around that way.

Q. But Mr. McGowan wasn't suggesting that to you?

A. No, he wasn't suggesting that to me.

Q. What else did you say to Mr. McGowan in the course of the conversation?

A. I told him that I would think it over. I didn't know whether I would go back or not.

Q. What else did you say to Mr. McGowan?

A. That is about all I did say.

Q. In the course of the evening, what did you say to Mr. McGowan?

A. I can't quite remember the exact words I told him.

Q. You can remember everything that he told you, as you testified, but you can't remember anything that you said to him?

(Testimony of William Earle Hough.)

A. Well, I told him that I would think it over, and that is all I said. [469]

Q. Do you remember any other thing that you said in the course of the conversation?

A. We talked about the business up there, how he got to be a supervisor, how long he had been on the force, or at the store, rather, and so on.

Q. When he said something about this contract that he had, what did you say to him?

A. I didn't say anything. I just let it go at that.

Q. When he suggested that you go to Spokane, what did you say?

A. I didn't say anything.

Q. You just sat there and said nothing?

A. That is right.

Q. Or is it that you don't remember what you said?

A. I can't remember all what was said.

Q. You don't remember anything that you said in the conversation at all? A. No.

Q. But you do remember everything that he said?

A. Yes, just about everything; not quite.

Q. Did you make any comments regarding what he stated at that time? A. No, I didn't.

Q. And you didn't talk it over with anyone until you told Mr. Malloy? [470]

A. That is right.

Q. Three months later?

(Testimony of William Earle Hough.)

A. That is about right. Three months later.

Mr. Ball: That is all.

Trial Examiner Bokat: Any redirect?

Redirect Examination

Q. (Mr. Walker) Just one thing, Mr. Hough. You started to say something about when Mr. Long came in, that Mr. McGowan started all over again, and at that point, counsel interrupted you and asked you if Mrs. McGowan was there. What were you going to say that Mr. McGowan said when Mr. Long came? A. What was I going to say?

Q. Yes. A. When Mr. Long came in?

Q. On cross examination, in describing what took place at Mr. McGowan's house, you stated that you arrived there first and then about 10 or 15 minutes later, Mr. Long came in.

A. That is right.

Q. And that when Mr. Long came in, Mr. McGowan started all over again? A. Yes.

Q. I took it that you were going to add something more to your answer when Mr. Ball asked you another question. Did you have anything further to add? A. No, I did not. [471]

Trial Examiner Bokat: The witness is excused. You may step down, please.

(Witness excused)

Mr. Walker: I will call Helen Blackburn.

Mr. Ball: At this time, the Respondent moves to strike the testimony of the witness Hough for the reason that it took place, apparently, during a social call, and there is no showing that there was any authority on the part of Mr. McGowan to make any statements ascribed to him, and, in any event, such statements would not be binding upon this respondent; and, on the further ground, that the testimony of this witness does not tend to prove or disprove any issues in this case.

Trial Examiner Bokat: The motion is denied.

HELEN BLACKBURN

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Give your name and address to the reporter.

The Witness: Helen Blackburn.

Trial Examiner Bokat: How do you spell your name?

The Witness: B-l-a-c-k-b-u-r-n (spelling).

Direct Examination

Q. (Mr. Walker) Where do you reside?

A. 2636 Southeast Pine.

Q. Portland, Oregon? [472]

A. Portland.

Q. Is it Miss Blackburn, or Mrs. Blackburn?

(Testimony of Helen Blackburn.)

A. Mrs. Blackburn.

Q. Have you been employed at the Montgomery Ward store? A. I have.

Q. Here in Portland? A. I have.

Q. When did you last work there?

A. December 6.

Q. How long had you worked for Montgomery Ward up to that time?

A. Well, it would be five years last March if I had stayed until that time.

Q. In December, 1940, what kind of work were you doing?

A. I was doing "Preferred Attention Orders"; that is, checking and packing.

Q. Who was your supervisor?

A. Mr. McGowan.

Q. Did you work Saturday, December 7?

A. I did not.

Q. Have you received any calls, or have you had any communications, or have you had any conversations with Mr. McGowan since December 6, 1940?

A. I called Mr. McGowan on Saturday night of the strike.

Q. How did you happen to do that?

A. I wanted to talk to him personally myself and tell him why [473] I was not working.

Q. Was that the first call that you had?

A. I had a call from the company before that telling me that the store would be open for operations on Monday morning.

(Testimony of Helen Blackburn.)

Q. When did you get the call?

A. The exact time,, I couldn't say; it was in the evening, though; it must have been between five and six o'clock.

Trial Examiner Bokat: When?

The Witness: Saturday evening.

Q. (Mr. Walker, continuing) December 7?

A. Yes, sir.

Q. When did you call Mr. McGowan?

A. I called him first and his wife told me that he was not home, and I asked her if he was still at the store, and she said that she thought he was.

Q. What did you do then?

A. I called the store.

Q. Did you get him? A. Yes.

Q. Who answered the telephone when you called the store?

A. The girl on the switchboard answered.

Q. What happened next?

A. I asked for our local, and Allen Murphy answered the phone, and I asked for Mr. McGowan. Then Mr. McGowan took the phone.

Q. What took place then? [474]

A. I told Mr. McGowan why I was not there, and he told me that I didn't have to go through the picket line, that I could go through the back way.

Mr. Ball: I will object to that as being too indefinite. It appears that she called on Mr. McGowan, which was purely a personal call, for personal reasons, and certainly there is nothing in that to indi-

(Testimony of Helen Blackburn.)

cate that there is any authority on the part of anyone to bind the respondent.

Furthermore, I object to the testimony as a summary, and a conclusion, stating why she was not there.

Trial Examiner Bokat: Well, I will let the answer stand. If you want the witness to specifically state what she told Mr. McGowan, she can do that.

Q. (Mr. Walker, continuing) What did you say to Mr. McGowan before you said this about not being there, and before he said that you didn't have to go through the picket line?

A. I told him why I had not been there; that is the first thing I told him.

Q. All right, what did he say?

A. He said that I didn't have to go through the picket line. First, I told him that I was not going to go through the picket line for my job. Then he told me that I didn't have to go through the picket line, that I could go through the back way. I asked him what he meant, and he said there was a door to the back entrance that I could come in.

Mr. Ball: The same objection to this testimony.

[475]

Trial Examiner Bokat: Same ruling.

Q. (Mr. Walker, continuing) Did you say anything?

A. I told him that I would see.

Q. Was there anything further?

(Testimony of Helen Blackburn.)

A. He said for me to tell the kids that if they weren't there on Monday morning, he was going to reinstate them with new employees.

Mr. Ball: Same objection.

Trial Examiner Bokar: Same ruling.

Q. (Mr. Walker, continuing) Was anything more said?

A. He said that if I would come in, he would sure make it up for me.

Q. Did you say anything to that?

A. I did not.

Mr. Walker: That is all.

Cross Examination

Q. (Mr. Ball) Who called you to give you the first message about the store calling?

A. I don't know who the gentleman was. He gave the message that the store was calling, and he didn't say who.

Mr. Walker: I would like to have that answer read.

(Thereupon the last answer of the witness was read aloud by the reporter as above recorded.)

Mr. Ball: That is all.

Trial Examiner Bokar: Do you have anything further, Mr. [476] Walker?

Mr. Walker: No.

Trial Examiner Bokar: The witness is excused.

(Witness excused)

Trial Examiner Bokat: We will suspend for ten minutes at this time.

(Thereupon, at this time a short recess was taken, after which proceedings were resumed as follows:)

Mr. Ball: The respondent requests the privilege of the Examiner to allow us to put Mr. John A. Barr on out of order.

Trial Examiner Bokat: I understand that the Board is ready to rest its case, with the exception of one witness by the name of Fullerton, and with the exception of a check to be made with regard to the Retail Clerks' claim of majority in the unit. That is a check with the payroll of the company, and inasmuch as Mr. Fullerton is not here yet, I think that it is proper for Mr. Barr to be permitted to take the stand. You may proceed, Mr. Ball.

Mr. Ball: Mr. Barr.

JOHN A. BARR

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Will you give your name and address, please, to the reporter?

The Witness: John A. Barr. My address is Gary, Indiana. [477]

Direct Examination

Q. (Mr. Ball) What is your responsibility and your association in the field of labor relations for Montgomery Ward?

(Testimony of John A. Barr.)

A. One of my responsibilities with Montgomery Ward is collective bargaining with representatives of Montgomery Ward employees and dealing with, or, rather, handling the labor relations problems of the company generally.

Q. How long have you been assigned responsibility in this field?

A. I have worked in this field for Montgomery Ward since the spring of 1937. Collective bargaining has been my definite responsibility since about September 1, 1940.

Q. What relationship does Mr. W. B. Powell have to you in the company?

A. Mr. Powell is an employee of Montgomery Ward & Company who works directly under my supervision and at my direction. Mr. Powell is located at our office in Oakland, California, and is our labor relations representative on the West Coast.

Q. And in the handling of those relations, with whom does he consult?

A. He consults with me.

Q. Have you at any time had occasion to consult with Mr. Powell?

A. Many times.

Q. Have you ever been present at any time in a collective [478] bargaining session in which Mr. Powell has been present?

A. I have.

Q. What is the policy of Montgomery Ward & Company with respect to collective bargaining?

Mr. Landye: I will object to that. That is clearly calling for a conclusion of the worst,—not of the

(Testimony of John A. Barr.)

worst, but one of the most broad possible viewpoints of policy. I think that we should have statement of acts done, and things that were said, rather than statements of policy.

Trial Examiner Bokar: I am afraid that I will have to sustain that.

Mr. Ball: I want to point out to the Examiner,—

Trial Examiner Bokar: I want to be consistent, Mr. Ball, in my rulings. Well, I will accept a general question, subject to further connection.

Mr. Ball: It certainly has relevancy to the state of mind with which the representatives assigned to responsibilities of carrying out the various duties of the office approach these matters,—

Trial Examiner Bokar: I sustained the objection originally because you have insisted right along that the witness state what was said and done and not indulge in conclusions and opinions and generalities.

Mr. Landye: This is more than a technical objection.

Trial Examiner Bokar: I didn't say it was technical. [479]

Mr. Landye: Because here, if the witness is allowed to state what is the policy, or what he intends or has intended to do as a matter of policy, it might have probative value on that type of thing, but that is not what we are concerned with here. We are concerned with the actual negotiations that were entered into; we are engaged in a trial involv-

(Testimony of John A. Barr.)

ing a charge for failure to collectively bargain. Now, if this witness is allowed to come in here and state what the policy of the company was, and what they intended to do, and so on, he has all the opportunity in the world to color his testimony with statements like that. I think that we should have some definite testimony as to what actions were taken, instead of generalities and philosophy.

Trial Examiner Bokar: I will reverse my original ruling, and see what develops. I will take it, subject to connection.

The Witness: What is the question?

Trial Examiner Bokar: Will you read the question, Mr. Reporter?

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. The policy of our company is to bargain collectively with any representative chosen by a majority of the employees in an appropriate bargaining unit.

Q. What position has the company taken towards what constitutes an appropriate bargaining unit? [480]

A. It is our position,——

Mr. Walker: Excuse me. May I ask that counsel be directed to direct his questions to any appropriate unit involved in this proceeding, at the Portland organization or Portland unit of the company?

Trial Examiner Bokar: I assume that the question is directed to that, or that it will be connected.

(Testimony of John A. Barr.)

A. (Witness continuing) It is our position at Portland, as at all other locations in the United States, that all of the employees in the retail store, with exception of the manager and his assistants, constitute an appropriate bargaining unit, and that all the employees of the mail order house, with exception of the management representatives, constitute a proper bargaining unit.

Mr. Walker: Just a minute. I move that that portion of the answer be stricken which contains the phrase "as well as all other stores of the United States."

Trial Examiner Bokat: Oh, I will let it stand for what it is worth. Actually, we are only concerned with this particular store.

Q. (Mr. Ball, continuing) What are the reasons which underlie this policy?

A. Taking the mail order house, for example, all of the employees in the house work under one management, and our schedules and wage scales of all the employees in the house are determined on [481] a housewide basis, the same factors being considered in fixing the schedules and wage scales for all the employees in the house. The activities of all the employees in the mail order house are related, and, to a large extent, are functioning interdependent. The operation of a mail order house is such that those things affecting a part of the employees necessarily affect all, so that the purposes of collective bargaining can only be carried out by bargaining

(Testimony of John A. Barr.)

for all the employees in the house, and it defeats the purpose if any special group of employees is segregated for that purpose.

The same principles apply in the retail store.

Q. Do the same principles apply specifically to Portland, Oregon? A. Yes, they do.

Q. In the course of collective bargaining, what has been your practice, and what have been your instructions to Mr. Powell as to the manner in which such collective bargaining sessions should be handled on the part of the company?

Mr. Landye: Is that restricted to Portland, or to the entire United States?

Trial Examiner Bokar: Let us restrict it to the Portland store.

Mr. Ball: I doubt if it could be. I assume the general instructions given to Mr. Powell dealt also with the Portland [482] situation. This happens to be Mr. Powell's territory.

Trial Examiner Bokar: All right.

A. In a general way, I have instructed Mr. Powell that he should meet with the employees' representatives to discuss and bargain with them over any demands which the representatives here in Portland,—that being the unions here which have been named,—presented to the management representatives.

Q. What instructions have you given with reference to discussing any problems with you that have arisen in the course of those negotiations?

A. Could you direct that to any specific phase

(Testimony of John A. Barr.)

of the bargaining? In other words, I have had a large number of conversations with Mr. Powell on the subject, and I was wondering whether you wanted me to direct those remarks, or confine my remarks to any instructions on any particular angle.

Mr. Landye: Is the witness questioning the lawyer?

Trial Examiner Bokst: Evidently, but I will let it stand.

Q. (Mr. Ball, continuing) What is the fact as to whether or not Mr. Powell did at any time during the course of his negotiations here in Portland discuss over the telephone or by letter or in any other way, the problems which had arisen in the course of negotiations?

A. Yes, he did. He discussed with me several problems which had arisen, and the principal ones which I recall were the ones which had arisen over closed shop demands which had been [483] made, arbitration demands, demands for seniority, and also Mr. Powell discussed with me on several occasions the demands for counter proposals which had been made in Portland.

Q. Now, how were these discussions with you conducted?

A. They were conducted, in the main, by telephone. They were also discussed in personal conversations, and, to some extent, by correspondence.

(Whereupon documents were marked as Respondent's Exhibits 8 and 9, respectively, for identification.)

(Testimony of John A. Barr.)

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's 8 for identification, and I will ask you if you recognize what that is; if so, tell the Examiner and the reporter what it is.

A. This is a letter which I wrote to Mr. Powell on September 11, 1940.

Q. What was the occasion of your writing that letter?

A. Mr. Powell had written me on September 9, 1940, forwarding with his letter of that date a copy of a contract which had been submitted in Portland by the Retail Clerks' Union.

Q. I hand you what the reporter has marked as Respondent's Exhibit 9 for identification and ask you if you know what that is?

A. Yes, I do. That is a letter which I wrote to Mr. Powell on October 11, 1940.

Q. What was the occasion of your writing that letter?

A. I had received a letter from Mr. Powell on October 8, [484] 1940.

Q. And subsequent to the writing of the two letters, Exhibits 8 and 9, did you have occasion at any time to discuss with Mr. Powell whether or not he had received these instructions and had carried them out?

A. Yes; and he told me that he had received them.

Q. He told you that he had received them and carried them out?

A. That is correct.

(Testimony of John A. Barr.)

Mr. Ball: Might I complete the record at this time by making an offer of these letters?

Mr. Walker: I object to Respondent's Exhibits 8 and 9 upon the ground *that the ground* that the same are hearsay.

Mr. Landye: Let the record show that counsel for the union enter the same objection; they are self-serving documents, not binding upon us or anyone else, and merely letters between company people; purely self-serving declarations.

(Thereupon a document was marked as Respondent's Exhibit 10 for identification.)

Trial Examiner Bokat: I am ready to make my ruling on Respondent's Exhibits 8 and 9 for identification. I will overrule the objections, and the reporter will mark them as received in evidence.

(Whereupon the documents heretofore marked as Respondent's Exhibits 8 and 9 for identification, were received in evidence.) [485]

RESPONDENT'S EXHIBIT 8

Chicago, Illinois

September 11, 1940

Mr. W. B. Powell

Law Department

Oakland, Cal.

Re: Retail Clerks' Union—Portland, Ore.

I have your letter of September 9th together with the attached copy of the proposed agreement submitted by the local union at Portland. You are cor-

(Testimony of John A. Barr.)

rect in your intention to raise the question with regard to representation as well as to appropriate unit. The unit issue is particularly pertinent here inasmuch as I understand that the retail clerks' union claims to represent certain classifications of mail order employees as well as retail store employees. Although it is not our policy to bargain with minority groups, it is perfectly satisfactory to discuss the terms of any proposed agreement with union representatives. The important thing in this regard is that we make our position known to the union representatives in a frank way so that there will be no misunderstanding.

Our thinking with regard to arbitration clauses is that they are not acceptable to us. We are not prepared to voluntarily relinquish any of the prerogatives of management in our dealings with the union. It is impossible to agree to any sort of an arbitration set-up without to some extent vesting in an outsider a decision-making prerogative which we feel must be retained within the management.

If there are any other provisions which give you concern do not hesitate to write.

J. A. B.

JOHN A. BARR

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 9

cc: Mr. Heidenger

Chicago, Oct. 11, 1940

Airmail

Mr. W. B. Powell

Law Department

Oakland, Cal.

Re: Retail Clerks' Union—Portland

I have your letter of October 8th. We have no objection to your discussing one proposed agreement with the two unions as suggested by your letter.

I would attempt to secure from them the exact number of retail store employees whom they claim to represent. You should tell them that you are not interested in determining the identity of their members but feel, that for your own personal protection in dealing with them you should have more definite information than that contained in their letter of October 2nd. However, if they refuse to give further information along this line, there is no objection to your proceeding on the basis of their October 2nd letter.

Our position with regard to the request for a counter proposal has been that we stand ready to discuss with the union each of their demands and to explain clearly and frankly the company's position in regard to each demand. You may further tell

(Testimony of John A. Barr.)

the union that they can consider your statement of the company's position as a counter proposal if they desire; regardless of what it is called, that is the company's position on the matter. I don't see that we should quibble over the term "counter proposal" and I suspect that, in effect, our statement of the company's position with regard to any union demand is a counter proposal. To date, however, we have not submitted any formal written counter proposal to a union. If you have a situation arise where you think it would be advisable to submit a formal counter proposal, I would appreciate your getting in touch with me before doing so.

JOHN A. BARR

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's Exhibit 10 for identification and ask you if you know what that is; if so, will you tell the Examiner and the Reporter?

A. Yes, I do. It is a letter which I wrote to Mr. Powell on November 1, 1940.

Q. And all these letters,—these three letters are the original letters, although they are on thin paper?

A. They are.

Mr. Ball: I think that we might offer into evidence Respondent's Exhibit No. 10. Let me ask one further question.

(Testimony of John A. Barr.)

Q. (Mr. Ball, continuing) The occasion for writing this letter was what?

A. I received a letter on October 28, 1940, from Mr. Powell, in which he enclosed a copy of the contract which had been submitted by the Warehousemen's Union; and this was in answer to his letter.

Q. Did you have occasion later on to discuss with Mr. Powell as to the contents of this letter, and whether he had carried out the instructions therein contained?

A. Yes. He received it, and he carried out the instructions.

Mr. Walker: I have no objection.

Mr. Landye: No objection.

Trial Examiner Bokar: There being no objection, it will be received and marked in evidence.

[486]

(Whereupon the document heretofore marked as Respondent's Exhibit No. 10 for identification was received in evidence.)

RESPONDENT'S EXHIBIT No. 10

Chicago

Nov. 1, 1940

Mr. W. B. Powell
Law Department
Oakland, Calif.

Re: Warehousemen's Union—Portland

I have your letter of October 28th together with attached copy of the agreement proposed by the

(Testimony of John A. Barr.)

union. Inasmuch as this agreement more or less follows the usual form there is probably nothing which I can add to your present thinking on the matter.

It seems to me that a statement such as that contained in the first sentence of Article 1 is really a statement of fact and is not a matter upon which the parties are free to agree or not agree. If the Union desires a statement of this nature in the agreement I believe that it should be stated in the form of a fact in a preliminary "Whereas" clause rather than in the body of the agreement. Also, I don't believe that we should agree that any employee or class of employees should or should not be members of the Union as set forth in the second sentence of Article 1. We should leave it to the unilateral decision of the Union whether or not superintendents should be members of the Union.

The preferential hiring and Union shop provisions of Article 2 are not acceptable. On a matter such as this where our objection is to the substance of the proposal rather than to the form in which it is presented or with respect to some details, it seems to me that there is no obligation upon us to make a counterproposal. In other words, there is nothing in the nature of a union shop or a preferential shop which is acceptable to us which could possibly form the basis of any counterproposal.

The standards of hours and wages discussed by Articles 3 and 4 of the agreement are largely local

(Testimony of John A. Barr.)

and the company's position on these would largely depend upon our policy of meeting the wage and hour standards of responsible competition in the community. Overtime, however, at the rate of time-and a half, should undoubtedly be figured upon a weekly basis of forty hours a week rather than upon a daily basis.

Article 6 appears to be ambiguous. I am not at all sure of what they are trying to say. Also, it seems from the wording of the Article that they are talking about something which may or may not happen in the future and are not bargaining over present working conditions.

There may be some peculiar situation in Portland at which Article 7 is aimed and I would hesitate to express an opinion without knowing all the facts. It would seem, however, that under normal conditions an employee should not be worked more than five consecutive hours without a meal period.

Section 1 of Article 8 is again merely a restatement of a requirement of the law and therefore cannot be the result of bargaining. If such a statement has any place in the contract at all it would be in a preliminary "Whereas" clause. Sections 2 and 3 of Article 8 are subject to substantive objections with which you are well acquainted.

With regard to Article 9, I would feel perfectly free to explain to the Union that the Company has no seniority policy in the sense that "seniority" is understood by the Union and that we do not pro-

(Testimony of John A. Barr.)

pose to adopt such a policy at this time. When pushed for a statement of our position on this subject, I have often stated that the Company's policy is rather an intangible one and difficult to reduce to words. However, it may be stated somewhat as follows: "The Company will determine questions of lay-off and re-hiring on the basis of various factors which the Company considers properly pertinent to the appraisal of individual employees including such factors as seniority, proficiency, adaptability, flexibility, promotability, ability, age, physical fitness and marital status." I fully agree with one union who has described a statement quite similar to the above as "What a mess of words". Nevertheless, it represents as nearly as I have been able to reduce it to words the Company's policy with regard to seniority, and we all realize that it simply is not seniority in the sense that the Union uses the term.

We certainly can have no objection to the first sentence of Article 11. In fact, this is a sentence which we should probably insist upon being included in connection with any agreement. I should say that we have no objection to the second sentence of Article 11, and that the third sentence is one which should be bargained and as to which you should exercise your own judgment on whether to give or not.

We would have no objection to Article 10 insofar as it pertains to our practice on vacations, but I am

(Testimony of John A. Barr.)

not clear as to what, if anything, is added by the last clause of the sentence providing for vacations of not less than one week.

We have no objection to the first sentence of Article 12.

You are of course acquainted with our position with regard to a Board of Arbitration as proposed in Article 13.

We discussed the subject of Article 14 in our telephone conversation the other evening so you are acquainted with the latest thinking on this.

I anticipate that you will have a rather interesting session with this group and we will of course appreciate your keeping us advised on the developments.

J. A. B.

JOHN A. BARR

JAB/s

Trial Examiner Bokat: All right, proceed.

Q. (Mr. Ball, continuing) Now, in the course of your discussions with Mr. Powell, about the Portland negotiations, did you ever have occasion to discuss the problem of a closed shop?

A. Yes, I did.

Q. And when I speak of a closed shop, what meaning do you attach to that phrase?

Mr. Landye: I will object to that as incompetent, irrelevant and immaterial.

(Testimony of John A. Barr.)

Trial Examiner Bokat: I will overrule it at this time.

A. To me, a closed shop means some arrangement whereby it is necessary for the employees to belong to the union involved in order to secure and maintain their employment with their employer. It is sometimes referred to, and quite commonly, as a union shop or preferential hiring. In fact, there are many phrases which are commonly used, all of which properly mean "closed shop".

Trial Examiner Bokat: To you?

The Witness: That is right.

Q. (Mr. Ball, continuing) It is in such a sense that you have employed the word in your instructions to Mr. Powell? [487]

A. That is right.

Q. Have you advanced, or what instructions have you given as to the attitude Mr. Powell should take in these negotiations towards a closed shop?

A. I have told Mr. Powell that we were not in favor of a closed shop, and that we could not agree to closed shop proposals which were made to us in Portland by both the Warehousemen's Union and the Retail Clerks' Union, and I told him why we took that position, and pointed out to him why the closed shop.—

Mr. Landye: I don't want to be renewing my objection all the time, but all these conversations between the witness and Mr. Powell are absolutely hearsay of the worst kind; we were not there, and

(Testimony of John A. Barr.)

we have no chance to adequately examine on what Mr. Powell may have said. I realize now that he is stating what he said, but I know what it is leading up to.

Trial Examiner Bokar: I will let it stand as one of the instructions given by him to one of his subordinates on labor relations here in Portland.

A. (Witness continuing) I said that we were opposed to a closed shop, because it unreasonably restricted the freedom of the management's choice of employees. It is one of the responsibilities of the management to choose the best and most available employees for the jobs available, and it is not in the interests of efficient management that the door should be [488] closed to that group who either are not members of the union or who, for some reason, will not become members of the union.

Mr. Landye: I move to strike the whole answer on the ground that it calls for an opinion and conclusion of the witness.

Trial Examiner Bokar: There is merit to the objection, but I am going to deny the motion.

A. (Witness continuing) I stated that we were opposed to the closed shop, secondly, because we felt that each employee should be free to exercise his own individual choice as to whether he would or would not belong to a labor organization.

Mr. Landye: May I renew my objection again at this point?

(Testimony of John A. Barr.)

Mr. Ball: May we have the complete answer, and then he can make the objection afterwards?

Trial Examiner Bokat: Let him complete the answer.

A. (Witness continuing) Further, as the law restrains us from using our economic power to restrain employees in any way from becoming members of a labor organization, by the same token, we feel that we should not coerce them to become members of any union.

Trial Examiner Bokat: Is that what you told Mr. Powell, or is that your philosophy?

The Witness: It is both. I have told Mr. Powell that. I also told Mr. Powell, as a third reason for our being opposed to a closed shop, that the closed shop tends to create a monopoly in the labor market, which we feel, is economically unsound. [489]

Fourthly, we feel that if the union in question is worth while, or is a worthwhile organization from the employees' standpoint, that they will join it; that is, the employees will, of their own volition, because it is in furtherance of their own interests voluntarily to join the union, and in that case, the protection of a closed shop is not necessary.

If, on the other hand, the union is not worthwhile from the employees' standpoint, then it does not deserve the protection of the closed shop.

Q. (Mr. Ball, continuing) Did you at any time instruct Mr. Powell to state those reasons as the company's position in the course of the collective bargaining discussions?

(Testimony of John A. Barr.)

A. Not specifically. However, I have told Mr. Powell that, on many occasions, that he should state the company's position fully with regard to any demands which were made by the union.

Q. What, if any, discussion have you had with Mr. Powell with reference to the negotiations on the subject of seniority?

Mr. Landye: Same objection.

Trial Examiner Bokar: I will make the same ruling.

A. I have told Mr. Powell in that regard, that the company has no principle of seniority, as that term is used by the unions, in the sense of strict seniority. I have told him, however, that the company does recognize seniority or length of service in determining lay-offs, but not as a sole determining factor, but that it considers seniority or length of service [490] as one factor along with the ability and proficiency of the employees involved.

Q. (Mr. Ball, continuing) In the course of your instructions and discussions with Mr. Powell over the handling of the discussions here in Portland,, have you had opportunity to discuss with him such matters as arbitrations, or any other subject matter relating thereto? A. Yes.

Q. What has been the subject of those discussions with Mr. Powell?

A. I have told Mr. Powell that the company was opposed to the principle of submitting disputes of that nature to a board of arbitration because, in the first place, we favored the handling of such dis-

(Testimony of John A. Barr.)

putes by a process of negotiation directly with the union rather than by arbitration. In the second place, we don't feel that the management could satisfy its obligation as manager and at the same time surrender its decision-making power to a third or independent person or body which person or body is not responsible to the company.

Q. What is the fact as to whether or not Montgomery Ward has any labor contracts containing a closed shop clause?

A. Montgomery Ward does not have any labor contract with a closed shop clause in it.

Q. Have you at any time had occasion to discuss with Mr. Powell, in connection with the Portland negotiations, the subject of counter proposals, so-called, and if so, what [491] has been the course of those discussions?

A. Yes. I have discussed the matter of counter proposals with Mr. Powell at some length. I have told Mr. Powell that, in my opinion and in the opinion of the company, counter proposals were not necessary to the process of bargaining. I pointed out to him that counter proposals, in the sense of making an offer to the Union which offers something over and above the status quo so far as the existing wages, hours and working conditions are concerned, are, of course, not necessary, and should never be made unless they are actually justified from an economic standpoint.

(Testimony of John A. Barr.)

I have also pointed out to Mr. Powell that a counter proposal in any formal written manner stating only the status quo condition should not be made during the process of bargaining at any point until it, or rather, when it did not appear that such a proposal would be suitable to the union, because, in my opinion, to do so would be poor bargaining, and would weaken the position of the company as party to the bargaining process.

I have also stated to Mr. Powell that, in the absence of some special circumstances, at least,—circumstances which do not exist in the Portland situation,—that the bargaining should be kept on an oral basis, because, by so doing, the negotiations would be more flexible; I have told him that during the initial stages of bargaining, when the parties were not in substantial agreement, the exchange of formal, written [492] proposals or counter proposals, was not only a waste of time but actually destroys their flexibility. I have stated to Mr. Powell that it was only after the parties to the bargaining process were in substantial agreement on the major point being bargained, that it was appropriate for the parties to then take an interest in the particular wording of the provisions of the contract being bargained, and that then was the time to reduce the matters being bargained preferably on an oral basis, to writing; and that that stage was never reached in Portland, to my mind.

(Testimony of John A. Barr.)

Q. What instructions, if any, have you given Mr. Powell further in regard to counter proposals?

I will withdraw my question.

A. Mr. Powell specifically asked me during the course of bargaining here in Portland whether or not a written counter proposal should be made, stating at the time that the representatives of the union had asked him, or rather, the company, for a counter proposal; and I instructed Mr. Powell that he should not submit a written counter proposal at that time.

Q. What instructions, if any, have you given Mr. Powell with reference to his handling of the Portland situation, with regard to stating the Company's position with respect to any demands made by the Union which the company considered objectionable?

A. I have told Mr. Powell on several occasions that, as to any demand which any union might make of the company, that we should [493] state to the Union the Company's position with regard to that demand fully, and that he should state to the Union that, if they wanted to consider that as a counter proposal, we had no objection, of course, to that; that all we could do with regard to any demand made upon the company was to state to the Union our attitude towards it, and if they cared to consider the statement of our attitude towards it, or any suggestions that we may have made with re-

(Testimony of John A. Barr.)

gard to it as a counter proposal, they were, of course, at liberty to do so.

The label "counter proposal", I suppose,—

Mr. Walker: Now, let me object. Isn't that,— is that phrase that is about to be stated by the witness, prefaced with "I suppose", actually a part of what you said to Mr. Powell? I think that should be clear, although I am objecting to this whole line of testimony as irrelevant.

Mr. Landye: We are getting to a matter of fairness now. This has gone on for some considerable time. I am going to object to this whole line, and in my objection, I want to state that I think that we should have what was said and done in the actual negotiations, and not a statement of philosophy which is self-serving testimony of the worst kind. We are not interested in what he told Mr. Powell. We have no way of finding out any of this; none of us were there. This can go on indefinitely.

Trial Examiner Bokat: I am going to permit him to state [494] what he instructed Mr. Powell, and accept it subject to some connection. I assume, of course, Mr. Powell will take the stand and carry on where this gentleman leaves off and describe what actually took place in the Portland negotiations, or in the discussions, if you prefer to call it that. Let us proceed.

Q. (Mr. Ball, continuing) Did you have, on any occasion, a discussion with Mr. Powell in connection with his negotiations at Portland, particularly with

(Testimony of John A. Barr.)

relation to the problem of an agreement on certain sections when other sections were not agreed upon?

A. Yes, I did.

Q. What was the discussion with Mr. Powell in regard to that?

A. I told Mr. Powell that in bargaining on a trade contract, that such a contract could only be agreed to in its entirety, or in an entire agreement; and that a good bargainer should never agree to any one section of a contract so long as other material sections of the proposed contract were in disagreement, because a change in one working condition might reflect itself in other working conditions; and I told Mr. Powell in his bargaining with reference of a contract, if such a clause taken up was apparently agreeable with the company, or any particular section, to state, in substance, "I see no present objection to that clause", but not to bind himself, or, through him, bind the company to that particular clause as an isolated section in the form of an agreement. I have stated that to [495] Mr. Powell several times.

Q. Do you recall having met Mr. Estabrook in Washington?

A. Yes, I met Mr. Estabrook in Washington on Sunday, September 8, 1940.

Q. What was the substance of the conversation that you had with Mr. Estabrook?

A. I met Mr. Estabrook at the ball game on Sunday afternoon in Washington. The meeting

(Testimony of John A. Barr.)

was a chance one, and it was quite brief. We exchanged greetings of the day, and made some comment upon the game, and Mr. Estabrook then made the remark that he didn't want to talk business on Sunday, but asked me if he could have an appointment with me in Chicago, on his way back to the Coast. I said, "Yes, I will be glad to see you."

Q. Did he say to you at that time that he would see you on his way back to the Coast?

A. Yes.

Q. Did he see you on his way back to the Coast?

A. Approximately two weeks later, I received a call from Mr. Estabrook. He said that he was calling from New York. He asked for an appointment which was arranged, and then two or three days later, sometime during the last week in September, Mr. Estabrook called on me at my office in Chicago.

Q. What took place at that meeting?

A. Mr. Estabrook said that he was on his way home, that he had [496] been away for several weeks in the East, and that he wanted to negotiate a contract on behalf of the Warehousemen's Union in Portland, and he wanted to ask me with whom he should negotiate; and I said to him that he should negotiate his contract with Mr. Powell, who was located in Oakland, and Mr. Huddleston, the manager of our mail order house in Portland.

He said that he thought maybe someone in Chicago would be the proper party to bargain with in

(Testimony of John A. Barr.)

regard to a contract, and if that was so, he would be glad to come to Chicago for that purpose. I said "no", that would not be necessary, that Mr. Powell, located at Oakland, had full authority to negotiate for the company.

Mr. Estabrook said that the matter had been delayed somewhat because he had been away from Portland for some time since the Labor Board certification of his union, but that when he got back to Portland, they would whip up a contract, as he called it, and that they would want to meet with us.

I told him that whenever he was ready he should call Mr. Huddleston, and Mr. Huddleston would immediately call Mr. Powell, and that I was very sure a meeting could be arranged shortly thereafter.

Mr. Estabrook asked me if Mr. Huddleston and Mr. Powell would actually have authority to negotiate with his union, and I said that they would have such authority. I stated that Mr. Powell had full authority to negotiate with them. Of course, [497] I stated, it was quite possible that some question or some problem might arise during the course of the negotiations which Mr. Powell would want to take up with me, and, I stated, if such a situation should arise, it would not unreasonably delay these things, because Mr. Powell could get in touch with me quite readily. Mr. Estabrook said that was perfectly all right with him. He stated that he just wanted to ascertain from me whom the bargaining should be done with.

(Testimony of John A. Barr.)

Q. As a matter of fact, did Mr. Powell in the course of negotiations in Portland take advantage of discussing with you problems that arose on policy?

A. He did, on several occasions.

Q. And did you in each case give him the answer?

A. I did, to the best of my ability.

Q. At that time, did Mr. Estabrook hand you a copy of the proposed contract?

A. No, he didn't.

Q. Did he make any reference to the existence of such a contract at that time?

A. He didn't say directly either that a contract did exist, or that one did not exist. He did say this: "When I get back to Portland, we will whip up a contract and then I will want to talk with you." And he also said, "Don't be scared when you see it. Of course, we will ask for more than we expect to get, because that is the way things are done." [498]

I said, "I am sure that you can arrange for your meeting in Portland and that things will be all right."

Q. Did you have occasion to go to California in December of 1940? A. Yes, I did.

Q. On what dates were you in Oakland, California?

A. I arrived in Oakland on December 10, 1940, and left Oakland, I believe, on December 20, 1940; and I was in Oakland during all of the intervening period.

Q. Did you have occasion to see Mr. Powell when you were in Oakland at that time? A. I did.

(Testimony of John A. Barr.)

Q. What was the occasion of your going to Oakland at that time?

A. I went to Oakland to consult with Mr. Powell regarding several matters there; as a matter of fact, I went there to consult with Mr. Powell and other company representatives at that point with regard to the labor situation which had developed on the Coast during the two weeks prior to my going there.

Q. During the course of that time when you were on the Coast, did you have occasion to meet with a Mr. Thomas White?

A. Yes, I did. I met with Mr. White on three occasions.

Q. At any time during those meetings, did Mr. White indicate or state that he was speaking in those discussions with you on behalf of the Retail Clerks or the Warehousemen, or both, located at Portland? [499]

A. Yes, he did. I met with Mr. White on the afternoon of December 11, in Oakland, and at that time he expressly said that he was fully authorized to speak for the Warehousemen's Union, the Retail Clerks' Union and the Office Workers' Union at Portland, as well as the unions involved in the labor dispute at Oakland.

Q. At that time, did he indicate, or rather, did he later indicate if he did, that he no longer possessed such authority?

A. He gave what I considered to be an indication of that the following day.

(Testimony of John A. Barr.)

Q. What day would that be?

A. December 12.

Mr. Landye: I move to strike that as an opinion and conclusion of the witness.

Trial Examiner Bokat: I think that you had better rephrase the question.

Q. (Mr. Ball, continuing) What did Mr. White say to you on the following day?

A. On the following day, Mr. White said that he was going to let Jack Estabrook run his own show in Portland.

Trial Examiner Bokat: What date was that?

The Witness: December 12, 1940.

Q. (Mr. Ball, continuing) And do you know of your own knowledge what time it was that Mr. Powell left Oakland to go to Portland, in the month of December? [500]

A. As I recall it, Mr. Powell left Oakland on December 12, 1940.

Q. And before he left, did he have any occasion to discuss the matters that he was going to handle at Portland?

A. In a general way, yes, and after he came to Portland we were in touch with each other by telephone several times. Mr. Powell was in Portland December 13, 14, 15, and 16. As I recall, he returned to Oakland on the 17th.

Q. What is the fact as to whether or not you have ever had any occasion to discuss with Mr.

(Testimony of John A. Barr.)

Powell the Company's wage policy with respect to the Portland negotiations?

Mr. Landye: That is objected to as leading, very leading. I have let a lot of this go in, but that is very leading.

Trial Examiner Bokat: Yes, it is, but I am going to let it stand, to save time.

A. I have discussed the company's wage policy on several occasions. I have told him that it is the company's policy to pay wages which are as high or higher than the wages paid by competition for the same or similar work in the community. I have told Mr. Powell that it is one of his responsibilities to determine that the policy is carried out,—to ascertain what the facts are and to see that the policy is being carried out, or, rather, to ascertain if the policy is being carried out, whenever any question is raised concerning the company's wages. [501]

Q. Have you at any time had any occasion to discuss, with reference to the Portland situation, the company's policy with respect to grievances?

Mr. Walker: I will object to that as immaterial.

Trial Examiner Bokat: Overruled.

A. I have told Mr. Powell that it is the feeling of the company that grievances of the employees, or groups of employees should be heard and considered by the management of the company; that the company was always glad to receive and consider grievances of any group of employees, or of any individual employee.

Q. (Mr. Ball, continuing) What instructions, if

(Testimony of John A. Barr.)

any, have you given him as to the action to be taken on such grievances?

Trial Examiner Bokat: There is no issue in this case concerning grievances, so far as I can see. I want to save time. We are involved more with the actual bargaining negotiations, which might have the question of grievances only as an incidental matter to the negotiations, or as a part of the negotiating process in negotiating a contract.

Mr. Ball: I take it that this subject is ruled out.

Trial Examiner Bokat: I don't want to prevent you from going ahead, but I don't think that it is within the issues.

Mr. Ball: Except that the proposed contracts submitted have some reference to grievances procedure.

Trial Examiner Bokat: Yes, I understand that, and I mentioned [502] that, I believe. However, it has more to do with the process of bargaining rather than any specific grievances that may be presented by the employees. I will let him answer the question. I don't want to limit you whatsoever, and I want to give the respondent every opportunity to defend itself against the charges.

The Witness: I would like to have the question read. I have lost the trend.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. I have stated that if any grievances arise, or any grievance is submitted by any employee, or

(Testimony of John A. Barr.)

group of employees, it can be looked into and considered promptly, and, if it is found that some corrective action is justified, it should immediately be done. I have stated that to Mr. Powell on many occasions, and that this action should be taken regardless of whether the grievances were presented by an employee who is a member of the union or an employee who is not a member of the union, or whether it was presented by a group of employees who are members or not members of the union; that is, the fact of their membership should not have any effect upon the company's action in remedying any situation which the conditions justify remedying.

(Thereupon documents were marked as Respondent's Exhibits 11 and 12, respectively, for identification.) [503]

Q. (Mr. Ball, continuing) I hand you what the reporter has marked as Respondent's Exhibits 11 and 12, and ask you if you know what they are; if so, tell the Examiner and the reporter.

A. Exhibit 11 is a page from the Oregon Journal of Friday, March 21, 1941, apparently page 15. It contains, among other things, an advertisement which was run in the paper on that date by Montgomery Ward.

Q. How about the other one?

A. Exhibit 12 is a page from the Oregonian of March 22, 1941, which contains, among other things, the statement of Montgomery Ward's position.

(Testimony of John A. Barr.)

Q. In short, it is an advertisement in that issue of the paper? A. That is correct.

Mr. Ball: I will offer Exhibits 11 and 12.

Mr. Walker: I will object to them on the ground that they are hearsay, self-serving declarations, and incompetent, irrelevant and immaterial.

Mr. Landye: Same objection.

Trial Examiner Bokar: I will overrule the objection and receive them in evidence, with this modification: that I am not accepting them as proof of the facts contained therein, but merely proof of the fact that Montgomery Ward & Company did place those advertisements in the paper on the dates [504] indicated, as indicated by the exhibits.

Mr. Ball: There is no question about the fact that those ads were run by Montgomery Ward?

Mr. Walker: No.

Mr. Landye: No.

Trial Examiner Bokar: I think there is no objection on that ground. With the modifications that I have stated, they will be received in evidence.

(Whereupon the documents heretofore marked as Respondent's Exhibits 11 and 12, respectively, for identification, were received in evidence.)

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 11

[Oregon Journal, Friday, March 21, 1941]

MONTGOMERY

WARD'S POSITION . . .

in regard to the picketing now in progress at its Portland Retail Store and Mail Order House is based upon the following simple facts:

1. Ward's Portland Store and Mail Order House were picketed December 7, 1940. This was the result of Ward's refusal to agree to a closed shop. No dispute existed as to wages or hours.

2. Wards has been denied service by the truck lines since December 7, 1940, and by the railroads since December 22, 1940.

Because of this refusal of service Wards has been unable to ship or receive merchandise by truck or rail since these dates.

3. Wards has acceded to all requests for bargaining conferences which have been made. Wards stands ready, as it always has, to bargain with any organization which represents a majority of its employees.

4. Wards will reduce to writing and sign any agreement reached as a result of such bargaining.

5. Wards has not, and will not, discriminate against any of its employees because of their

(Testimony of John A. Barr.)

membership or non-membership in any labor organization.

MONTGOMERY WARD and COMPANY

RESPONDENT'S EXHIBIT No. 12

[The Oregonian, Saturday, March 22, 1941]

MONTGOMERY

WARD'S POSITION . . .

in regard to the picketing now in progress at its Portland Retail Store and Mail Order House is based upon the following simple facts:

1. Ward's Portland Store and Mail Order House were picketed December 7, 1940. This was the result of Ward's refusal to agree to a closed shop. No dispute existed as to wages or hours.

2. Wards has been denied service by the truck lines since December 7, 1940, and by the railroads since December 22, 1940.

Because of this refusal of service Wards has been unable to ship or receive merchandise by truck or rail since these dates.

3. Wards has acceded to all requests for bargaining conferences which have been made. Wards stands ready, as it always has, to bargain with any organization which represents a majority of its employees.

(Testimony of John A. Barr.)

4. Wards will reduce to writing and sign any agreement reached as a result of such bargaining.

5. Wards has not, and will not, discriminate against any of its employees because of their membership or non-membership in any labor organization.

MONTGOMERY WARD and COMPANY

Mr. Ball: That is all. Your witness.

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Trial Examiner Bokat: We will recess at this time until 7:00 p. m.

(At 5:55 p. m. the hearing was recessed until 7:00 p. m.) [505]

Evening Session

Trial Examiner Bokat: The hearing will please come to order.

Mr. Ball: Will you mark these, please?

(Whereupon the documents hereinabove referred to were marked for identification as Respondent's Exhibits 13, 14, 15 and 16, respectively.)

Trial Examiner Bokat: Now you can offer them all.

(Testimony of John A. Barr.)

Mr. Ball: I offer in evidence Respondent's Exhibits 13, 14, 15 and 16; exhibits 14, 15 and 16 being produced in response to the request of Mr. Landye.

Trial Examiner Bokat: And there is no objection to any of those exhibits, I assume?

Mr. Landye: No.

Trial Examiner Bokat: They will be received and marked in evidence.

(Whereupon the documents heretofore marked for identification, respectively as Respondent's Exhibits 13, 14, 15 and 16 for identification, were received in evidence.)

RESPONDENT'S EXHIBIT No. 13

Office Workers!!

Retail Clerks!!

MONTGOMERY WARD & CO.

Retail Clerks and Office Workers of Montgomery Ward and Co. are requested to attend a meeting called in their behalf at 8:00 P.M., Tuesday, May 14, 1940, to be held in the DeMolay Room, Lower Level, Masonic Temple, S.W. Park Ave., between Madison and Main Streets.

Very satisfactory progress is being made in our endeavor to organize the employes of your store; however, it is necessary that we secure additional applications of workers in these two departments.

At this meeting we will once again go into the matter of a suitable proposed agreement to be sub-

(Testimony of John A. Barr.)

mitted to your employer, which will effect all workers in these two classifications. Come and discuss this very important matter with us.

Office workers includes those doing clerical work or operating any type of office equipment in the following departments or offices: Stock record office, Credit office, Order office, Retail store office, Personnel office, and the following departments: Adjustment, Traffic, Entry, Mail opening, Index, Pricing, Accounts Payable, Timekeeping, Factory Order, House Auditing, Folder billing, Freight billing, C.O.D. billing and billers in Packing department.

Retail clerks includes all employes actively engaged in handling or selling merchandise in all of the Retail departments, including stockroom men, salespeople, window trimmers, catalogue-order girls, etc.

OFFICE EMPLOYES UNION

Local 16821

J. HOWARD HICKS,

Secty.

RETAIL DEPT. STORE CLERKS

UNION Local 1257

FRED DIXON,

Secty.

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 14

Personal & Confidential

Airmail

Oakland, California

September 9, 1940

Mr. J. A. Barr

Law Department

Chicago, Illinois

Re: Labor Relations—Portland Retail Store

Attached is a copy of proposed agreement submitted by the Retail Clerks Union in Portland, Oregon, to Mr. Barth our store manager.

Mr. Barth stated to the Union that he would have to refer the agreement to the Oakland office. The Union claims that 95% of the store employees are members of the Union, whereas Mr. Barth believes that at the present time the Union does not have a 50% membership.

Of course, when we enter into a bargaining session with the Union we want to raise the question of appropriate unit and the question of representation. However, I presume that after we have raised those questions we should remain willing to discuss the terms of the proposed agreement.

Will you please let me know the present thinking in regard to arbitration clauses.

W.B.P.

W. B. POWELL

WBP:RD

Law Department

Enc.

Ans. 9/11/40

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

DEPARTMENT STORE
WAGE SCALE AND AGREEMENT

of

RETAIL CLERKS UNION, LOCAL 1257

Retail Clerks International Protective Assn.

Between, of Portland, Oregon
and Local No. 1257 Retail Clerks International Protective Association, of Portland, Oregon, Affiliated with the A. F. of L.

This Agreement, mutually made and entered into this day of, 1940, by and between of Portland, Oregon, Party of the First Part, and the Retail Clerks International Protective Association, Local No. 1257, of Portland, Oregon, Party of the Second Part, to-wit:

Section 1. Employers shall be entitled to employ or hire any employees, provided, however, that such employees shall make application within two (2) weeks after being employed to become a member of the Union and if satisfactory to the employer and found worthy by the Union he will be admitted to full membership in the Union.

(a) A temporary working permit good for thirty (30) days only shall be secured by all new or extra salespeople, not members of the Union at the time of employment, provided they are employed more than one (1) day. No working permits shall be issued until all available regular employees of the company

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

are restored to full time service if competent, and available. All new steady employees working half time or in excess, shall be issued a permit for thirty (30) days only, at the expiration of which time they shall affiliate with the Union, provided, they are still employed half time, or in excess. Regular extra employees who are employed less than half time shall secure a working permit from the Union the first of every month.

Section 2. All persons employed by the Party of the First Part who are actively engaged in selling shall be members of the Retail Clerks Union, Local No. 1257, and all other employees as designated by ensuing classifications shall be members of Local 1257. Window trimmers and assistants; mail order department employees; floor cashiers; outside salesmen; marking room employees; bundle wrappers; and all other employees not coming under the jurisdiction of any other Union, except executives. The exception of the executives are to be agreed upon between the Business Representative of the Union and the Representative of the employer.

Section 3. No male employee shall be discharged and replaced by a female employee unless the female employee shall receive the minimum wage for men as classified. This shall not apply when a male employee leaves the company of his own accord or is dismissed for good and sufficient reason.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

Section 4. No regular full time and no regular part time employee shall suffer any reduction of pay or be required to make up any time for holidays, the following holidays are to be observed; New Year's Day; Memorial Day; Fourth of July; Thanksgiving Day; Labor Day; and Christmas Day, and all other holidays nationally or locally observed by the stores parties to this agreement. When a holiday falls on Sunday the following Monday shall be observed.

Section 5. In the laying off of help due to slackness of business and in the consequent re-employment, seniority rights shall be observed.

Section 6. A mutually agreeable system shall be worked out between the employers, parties to this agreement, and the Union, to permit the Union activities of receiving complaints and collecting dues during working hours, provided that such activities shall be conducted at reasonable times and so as not to interfere unreasonably with the conduct of the employers' business or interrupt or interfere with the performance of work.

Section 7. There shall be no discrimination by the Employer against any employee or applicant on account of membership in or activity on behalf of the Union.

Section 8. Duly authorized representatives of the Union, not on the payroll of the employer, shall be permitted to visit the stores, for the purpose of

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

observing conditions under which members of the Union are working, and to see that the agreement is observed; provided that such visits shall not be made during rush hours, and that the time of such visits shall be first arranged with the Employer. The Employer agrees to cooperate in arranging for such visits at reasonable times and to name two (2) or more persons in each store, each of whom shall have authority to make arrangements for such visits.

Section 9. The Employer shall provide in each store a bulletin board or boards, conveniently located, for the posting of notices of official business of the Union. The Union agrees that it will not distribute handbills, posters, or other literature within the store. The Employer will provide a receptacle or receptacles, at or near such bulletin board or boards in which the Union may place such notices of official business from 2 o'clock on.

Section 10. For the purposes of this agreement, employees are designated as:

- (a) Regular full-time employees
- (b) Regular short-hour employees
- (c) Extra employees

They are defined as follows:

(a) Regular full-time employee is one who has been employed to work a full number of hours each week. Any employee continuously employed on a

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

full-time basis by the Employer for at least six (6) months shall be considered a regular full-time employee.

(b) A regular short-time employee is one who has been employed regularly less hours per week than a full working week. Any employee who has been continuously employed by the Employer on a short hour basis for at least six (6) months shall be considered a regular short-hour employee.

(c) An extra employee is one employed for temporary work.

(d) a break of service shall not prevent such service from being continuous under subdivisions (a) or (b) of this section, provided that six (6) months of actual service shall have been rendered within a total period of two (2) years from commencement of employment.

Experience shall be based on the total experience accumulated in retail stores or departments of the same classifications.

(e) It is understood and agreed that all of those employees who were employed as regular full-time employees, or regular shorttime employees, as of _____, and who, at the time of signing of this agreement will not have had six (6) months service shall automatically be rated as regular full-time employees, or regular short-hour employees as the case may be.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

(f) The term "regular" used in this section, refers to the status of an employee within the particular establishment in which he is working. To attain such regular status the employee must have had six (6) months of continuous employment, as defined above, with the same employer in Portland.

Section 11. (2) Each employee shall be provided with a card setting forth classification of employment, wage, and daily schedule of hours of employment with the starting and finishing time for each day.

(b) Immediately after the signing of this agreement there shall be established a Classification Committee composed of three (3) representatives of the Employer and three (3) representatives of the Union. It shall be the duty of this Committee to pass on all matters pertaining to adjustments of the classification of employment.

Section 12. (a) Forty-four hours completed within six days shall constitute a week's work. Employees shall be placed on a straight time schedule of hours, such schedule to be entered on employees' classification cards. Before any change is made in any such schedule one week's notice shall be given to the employees affected, except in cases of emergency or where the change is mutually agreed to by the Employer and the employees affected.

(b) Overtime shall be paid for at the rate of time and one-half.

(Testimony of John A. Barr.)

All sales or transactions are to be completed if they are taking place at the normal quitting time of the employee without payment of overtime.

(c) Overtime shall be paid for all work prior to 9:15 a.m. or after 5:45 p.m., as the case may be, and except in the case of those employees whose work must necessarily be performed in whole or in part before 9:15 a.m. or after 5:45 p.m. as the case may be.

(1) Mail openers and distributors, sales audit clerks, cash register readers, stock distributors:

(2) Extra wrappers, packers, parcel post and delivery employees who on Saturdays are required to report for duty after 1 p.m.:

(3) Employees required for inventory work on one night in January and one night in July.

(d) Outside salesmen, collectors, appraisers and adjusters shall be exempt from all limitations of hours except when required to do inside work.

Section 13. No one shall be sent to lunch prior to eleven (11:00) A.M. Every employee shall be sent to lunch at least within five (5) hours of the time of their reporting to work. Any employee who works in excess of five (5) hours without lunch period shall receive overtime for all such work performed in excess of five (5) hours. All sales or transactions shall be completed if they are taking place at the time the person is to go to lunch, without the payment of overtime.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

Section 14. When a company doctor pronounces an employee physically unfit to carry on their active duties as an employee; the employee shall have the right to demand an examination by an outside doctor supplied by the Union. If the two doctors are unable to agree on the diagnosis they shall call in a third doctor and the decision handed down by the third doctor shall be binding. The cost shall be borne equally by the employer and the Union.

Section 15. (a) All regular employees who have been in the service of the employer continuously for one year shall be granted a minimum of one week's vacation with pay. All regular employees who have been in the service of the Employer continuously for two years shall be granted a minimum of two weeks' vacation with pay. In cases where stores have vacation policies which are not in conflict with the foregoing said policies may be retained. Vacations shall be granted between April 1 and October 1 or at other times if mutually agreeable. This provision shall be effective after the current vacation schedule.

(b) In the case of regular short-hour employees pay for the vacation period shall be the average weekly pay received by such employee during the year preceding the vacation.

(c) Leaves of absence or any employee called for government service shall be granted at the discretion of the Employer, and when so granted em-

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

ployee shall be assured of his return to employment without loss of standing.

Section 16. Employers shall have the right to discharge any employee for unbecoming conduct, insubordination, incompetency, neglect of duty, failure to perform work as required not contrary to the terms of this agreement, or to observe safety rules and regulations, or the employer's store rules, which shall be conspicuously posted. If any employee feels he has been unjustly discharged, he shall have the right to appeal to the Adjustment Board.

Section 17. To insure that full and fair consideration be given all employees in filling vacancies or new positions, in making transfers, promotion, or wage increases, the Employer agrees to review regularly the records of all employees.

Section 18. It is understood and agreed that quota systems shall not be used as the sole basis for discharges.

Section 19. Stock help shall be provided for the Women's Coat Departments, Yardage and Blankets.

Section 20. (a) The Employer may require sales employees to do non-selling work providing that such assignments shall not be made during the peak hours and recognizing at all times the common interest of the Employer and of sales employees in the enjoyment by the latter of all reasonable and practicable opportunities of effecting sales. It is

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

further agreed that such assignments shall be equitably distributed between the various members of the department.

(b) The Employer may make temporary assignments of non-selling employees to do selling work during peak hours or seasons only but keeping in mind also the common interest of the Employer and of the selling employees in the enjoyment by the latter of all reasonable and practicable opportunities of *affecting* sales.

Section 21. If compulsory sales or educational meetings are held, they shall be on the Employer's time. Provided, however, that this does not apply to applicants who do not subsequently report for work.

Section 22. All contributions to charity shall be voluntary. It is understood and agreed that no compulsion shall be placed on the employee to force contributions.

Section 23. Not oftener than once a month sales employees, upon individual request, shall be furnished with records of their sales, provided such sales are individually recorded.

Section 24. Department heads, buyers and assistant buyers, making sales, shall enter the same on a department book, such sales to be divided equally among the employees in the department, provided, however, that where a department head, buyers and assistant buyer have their own books this principle shall not apply.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

Section 25. An employee whose earning capacity is limited because of physical or mental handicap, or other infirmities, may be employed on suitable work at a wage agreeable to the Employer, the employee and the Union.

Section 26. (a) The employer agrees to pay all fidelity bond premiums. All cash deposits or cash bonds in lieu of fidelity bonds now in force will be returned to the employees so affected at once. No employee shall be required to pay any premiums on public liability and property damage insurance required by the Employer, and covering the operation of an automobile while used in the Employer's business. Charges for physical examinations or sales training, when required by the Employer shall be borne by the Employer.

(b) Any employee using his automobile for company service shall be compensated at the rate of five (5) cents per mile for all miles so used required by the Employer.

Section 27. The provisions of this agreement shall apply to all departments leased or subleased to others except where and so long as bona fide agreements or leases between the employers and the lessees or sub-lessees in force at the date of this agreement do not permit such application. Subject to the exception stated in the preceding sentence of this paragraph, the provisions of this agreement

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

shall also apply to employees acting as demonstrators or selling jointly for the Employer and others.

Section 28. Where the Employer requires employees to wear identical garb as to style or fashion, when such garb is not suitable for street wear, the Employer shall furnish the same. The Employer shall also provide for the maintenance of such garb.

Section 29. No more than one (1) apprentice shall be employed for each twenty (20) employees. These apprentices shall be reasonably divided among the different departments of the store, both selling and non-selling. It is agreed that an apprentice is an employee having less than six (6) months experience in the retail trade, who receives less than the minimum wages specified herein for experienced employees and not less than the minimum scale for apprentices as herein provided for. Time served in one or more stores as an apprentice shall be cumulative.

Section 30. No salary rate herein provided shall be considered other than a minimum wage, and no salary rate above the minimums provided herein shall be reduced.

Before any Employer terminates Group Insurance in effect at the signing of this Agreement, he shall give thirty (30) days' notice of his intention to terminate to the employees affected.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

Section 31. The following are agreed classification, minimum weekly and monthly rates of pay thereof, and special working conditions as listed under the specified classifications noted:

I. Men's clothing

\$23.00.....first year experience
\$25.00.....second year experience
\$32.00.....thereafter

(b) Men's Furnishing

\$22.50.....first six months experience
\$25.00.....second six months experience
\$27.50.....thereafter

II. Shoe Department

1. Every regular male employee shall receive a minimum wage of \$27.50 per week, or \$119.50 per month. Extra help shall receive a minimum wage of \$5.00 per day.

2. Every part time employee shall receive a minimum wage of seventy-five (.75¢) cents per hour if employee works less than a full day. Any employee shall not work less than four hours in any one day.

3. Every female employee shall receive a minimum wage of \$22.50 per week, or \$97.50 per month.

4. Every part time female employee shall receive a minimum wage based on the above minimum scale in proportion to the number of hours she

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

works bears to the full day and shall not work less than four hours in any one day.

5. Every apprentice shall receive a minimum wage as follows:

\$12.50 per week.....	\$54.16 per mo.....	first six months
\$17.50 per week.....	\$75.83 per mo.....	second six months
\$22.50 per week.....	\$97.50 per mo.....	third six months
\$25.00 per week.....	\$103.88 per mo.....	fourth six months.

6. All wages, salaries and commissions in force at the time of the making of this contract, greater than the minimum wages guaranteed under this contract, shall be continued in force, and any attempt on the part of the employer to diminish or cut down such wages or either, or both, shall constitute a breach of this contract.

7. Disregard the monthly pay clause if store is paying by week.

8. Any employee reporting for work at opening time shall receive a full day's pay.

III. Women's Ready to wear and Corsets

Women employed in Ready to wear; suits, coats, silk dresses, corseteers, gloves, piece goods, blankets, draperies, and hats shall receive the following scale:

\$16.00.....	first six months experience
\$18.00.....	second six months experience
\$22.50.....	third six months experience
\$25.00.....	thereafter

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

IV. miscellaneous classification

Service desk, candy, drugs, dry goods, wash dresses, lingerie, ladies underwear, infants wear, bargain room and markers.

\$16.00.....first six months experience

\$18.00.....second six months experience

\$22.50.....thereafter

V. Hardware

Hardware, sporting goods and paints

\$20.00.....first six months experience

\$25.00.....second six months “

\$27.50.....third six months “

\$32.50.....Thereafter

VI. Jewelry

\$25.00

VII. Household

Stoves, major appliance, radios, furniture and rugs.

There shall be a minimum guarantee of \$35.00 per week for experienced men. The men to work on present percentage basis with the stipulated guarantee.

VIII. Stockmen and farm basement

\$32.50

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

IX. City Delivery

Shipping clerk	\$32.50
Dockmen	\$27.50
Supervisor	\$35.00

X. Service Station

Collectors and adjusters.....	\$27.50
Service and repairs.....	\$27.50

XI. Window trimmers and display men

Combination employees, including window trimmers or those working in more than one department shall receive one-half of the difference between the two scales applying over and above the lower scale. This provision does not apply to employees whose work in an additional department is incidental and occasional.

\$35.00

XII. Farm equipment and plumbing

\$25.00.....	first six months experience
\$27.50.....	second six months experience
\$32.50.....	thereafter

XIII. Catalog order desk

\$16.00.....	first six months experience
\$18.00.....	second six months experience
\$22.00.....	thereafter

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

XIV. Outside salesman:

The outside salesmen shall be guaranteed a weekly drawing account of not less than \$25.00 and five (5) cents mileage for all miles used for company service. Their hours will not be restricted.

XV. Tires, automobile parts and accessories

\$25.00 per week.....first six months experience

\$27.50 per week.....second six months experience

\$35.00 per week.....thereafter

Purchasing Agent—Any employee designated as a Purchasing Agent actively engaged in the Parts Department handling parts shall be paid not less than One Hundred and Seventy-five (\$175) Dollars per month.

Parts Manager—In charge of the Department and receiving in excess of One Hundred and Seventy-five (\$175) Dollars per month shall not be subject to the terms of this agreement.

All Parts Department and Accessories Departments will close to the public between the hours of 5:45 p.m. and 9:15 a.m.

Section 32. General Utility Employees

General utility employees shall be those employees not definitely regularly assigned to specific duties in any selling or non-selling department. They may be used at the discretion of the employer in any

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

department of the store and for any duties, either selling or non-selling, as the occasion arises. Their number shall not exceed six (6) for the first one hundred (100) and five (5) for each one hundred (100) thereafter.

The minimum rate of pay for such employees shall be \$27.50 per week.

Section 33. Extra Employees

All extra employees shall receive a differential of Five Cents (5¢) per hour above the scale in the classification in which they work, with a guarantee of four (4) hours pay when ordered to report for work.

Section 34. Regular short-hour employees.

Regular short-hour employees shall receive the rate of pay provided for the classification in which they are employed.

Section 35. Apprentices

The minimum weekly wage for apprentices shall be not less than Sixteen Dollars (\$16.00) per week.

Section 36.

Assistant Buyers, Department Heads, and Heads of Stock shall receive at least 10% increase in their guaranteed weekly rates above the maximum scale of their department.

Section 37.

All employees working split shifts shall receive One Dollar (\$1.00) extra per day.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

Section 38.

(a) The monthly quota shall be for each month one-twelfth of the total yearly quota of the year from to Such monthly quota shall be maintained at the same figure for each month of the year. Deficiencies shall not be carried forward from one month to another. The present rate of commissions applicable to quotas shall not be reduced, nor shall any present rate of commission be reduced. Commissions shall be paid monthly.

(b) Those employees below the minimums herein provided shall be increased to such minimums, but in no case shall employees receive less than 10 per cent increase in their guaranteed weekly salary or weekly drawing account, up to and including employees receiving \$34.99 per week as a weekly minimum guarantee or a weekly drawing account.

Section 39. Immediately upon the signing of this agreement there shall be established an Adjustment Board made up of three (3) representatives of the Employer and three (3) representatives of the Union. The Board shall meet within ten (10) days of the signing of this agreement and select by mutual agreement a panel of (5) impartial persons, any one of whom may act as arbitrator at such time as the Adjustment Board is unable to agree upon any matter referred to it.

If the parties hereto are unable to agree within twenty (20) days after the signing of this agree-

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

ment to the panel of five (5) impartial persons who may be requested to act as arbitrators,, shall each be requested to designate three (3) persons who in their opinion are qualified to act as impartial arbitrators. From the total list so made up, each party may strike two (2) names, and the remaining names will constitute the panel from which an arbitrator shall be selected as provided herein.

No arbitrator shall be chosen to serve in two consecutive arbitrations unless by mutual consent of the parties.

The Adjustment Board shall consider all complaints and disputes arising under the terms of this agreement, all questions of interpretation of the agreement and discharge cases. All discharge cases must be appealed to the Board within four (4) days from the date of discharge, otherwise the right to appeal is lost. The Board of Adjustment shall have no authority to negotiate a new agreement.

Any matter referred to the Adjustment Board shall be taken up by the Board within forty-eight (48) hours. If the Board is unable to reach a settlement within five (5) days then the matter shall be submitted for disposition to one of the persons on the panel of impartial arbitrators selected by lot. Any decision made by a majority of the Adjustment Board as a result of arbitration, shall be accepted as final and binding. Any expenses incurred as the

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

result of arbitration shall be borne one-half by the Union and one-half by the Employer.

Section 40. In consideration of the Employer signing this agreement and fulfilling the conditions thereof, the Association agrees to notify its membership, the Central Labor Council of Portland, Oregon, and the District Council of the State Oregon and that the Employer herein has signed this collective bargaining agreement with the Association. The Association further agrees to loan to the Employer Union Card No. the property of and issued by the Retail Clerks International Protective Association affiliated with the American Federation of Labor, for the period this contract shall be in full force and effect; provided, however, that the Employer agrees to surrender said Union Store Card so loaned to him as aforesaid upon the expiration of this agreement, or upon demand made upon him by the Association, or upon violation of any provision or provisions of this agreement.

Section 41. This agreement shall be in full force and effect to and including the day of, 1940; and shall be renewed for the following year and from year to year thereafter unless either party shall give written notice to the other at least sixty (60) days prior to any day of during the life of this agreement of a desire to amend this agreement.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 14 continued)

If, after giving such notice and prior to the day of next ensuing, the parties shall fail to agree to such amendments, this agreement shall terminate at the expiration date; provided, however, that the parties may, by mutual written agreement, extend the agreement for the specified period beyond such expiration date for the continuance of negotiations; and provided, further, that after either party has given such sixty (60) days written notice of a desire to amend the agreement, either party may, not less than twenty (20) days prior to the expiration date, give to the other party written notice that it desires to terminate the agreement at the expiration date, in which event the agreement shall so terminate at such expiration date.

In Witness Whereof the parties have hereunto set their hands, in duplicate, by their respective officers or representatives thereunto duly authorized at the City of Portland, State of Oregon.

FOR THE UNION

.....
.....

FOR THE EMPLOYER

.....
.....

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 15

Airmail

Oakland, California

October 8, 1940

Personal

Mr. J. A. Barr

Law Department

Chicago, Illinois

Re: Retail Clerks Union, Portland, Oregon

Pursuant to our telephone conversation last Monday, I instructed Mr. Barth, the manager at Portland, to tell the Retail Clerks Union that we would accept their letter stating how many of the store's employees they claim to have. I told Mr. Barth we wanted the Union to state the actual number of their membership in the store, or the percentage. However, as you will see by the attached copy of a letter to Mr. Barth, the Retail Clerks have merely stated that they represent an overwhelming majority. Also you will note that the letter is signed not only by the Retail Clerks but the Office Employees Union. The Retail Clerks claim to have a majority but their internal organization will not allow them to bargain for the office workers, and, therefore, they have drawn in the Office Employees Union.

I see no objection to discussing one proposed agreement with the two Unions, and if you have any suggestions on this point I will be glad to get

(Testimony of John A. Barr.)

them. As the matter now stands we will probably meet with the representatives of these two Unions in Portland sometime next week. Incidentally, in our September 19 discussion at Portland the Retail Clerks were represented by a Mr. Landye, who stated he represented the Warehousemen's Union in the Mail Order certification hearing. He mentioned your name during the course of our discussion and I thought you might be interested to know he will probably attend our future discussions with the Retail Clerks.

I have a question which may arise in our discussions with various Union representatives here on the Coast. I anticipate that our objections to terms of a proposed contract will be met with the query "what counter proposal is the Company willing to make?" At present my reply to such a query would be that the Company is perfectly willing to discuss any proposals the Union has to offer at any time, and we have no counter proposal to offer. However, I am wondering if the Company may desire to give some other answer to this question, if and when it is raised.

W. B. P.

W. B. POWELL

Law Department

Ans. 10/11/40.

(Testimony of John A. Barr.)

Retail Clerks, Local Union No. 1257
ATwater 0171—404 Labor Temple
Portland, Oregon

October 2, 1940

Mr. E. L. Barth, Local Manager
Montgomery Ward & Company
2741 N. W. Vaughn Street
Portland, Oregon

Dear Sir:

As you know, the Retail Clerks Union, Local 1257, represents an overwhelming majority of your employees engaged in retail selling in your retail store in Portland, Oregon, also the Office Employees Union, No. 16821, represents a great majority of your office workers in the retail store.

This is to notify you that we are willing to negotiate a contract for the entire retail store. We are agreeable that the negotiations cover the office workers as well as the retail clerks, that one contract be signed covering the entire retail store, and that such contract will be negotiated by both unions involved at one time, and if an agreement can be

(Testimony of John A. Barr.)

reached it will be signed by both unions involved.

Yours very truly,

RETAIL CLERKS UNION

Local 1257

FRED DIXON,

Secretary

OFFICE EMPLOYEES UNION

Local 16821

HOWARD HICKS,

Secretary

FD:HH:JS

RESPONDENT'S EXHIBIT No. 16

Oakland, California

October 28, 1940

Mr. J. A. Barr

Law Department

Chicago, Illinois

Re: Warehousemen's Union—Portland

Attached is a copy of the proposed agreement submitted by Mr. Estabrook.

W. B. P.

W. B. POWELL

Law Department

WBP:RD

Enc.

Ans. 11/1/40

(Testimony of John A. Barr.)

Personal

Airmail

Oakland, California

October 28, 1940

Mr. O. W. Huddleston, Mgr.

Portland Mail Order House

Portland, Oregon

—6—

Personnel

Your letter of October 25 with copy of agreement has been received.

I will be in Nampa, Idaho, the balance of this week and I would suggest that, if the matter meets with your convenience, the meeting with Estabrook be arranged for Wednesday, November 6 or Thursday, November 7. Of course, we are not anxious to hurry up the meeting, but if Estabrook insists upon an early discussion of the agreement, either of the above two dates will be satisfactory.

W. B. POWELL

Law Department

WBP:RD

AGREEMENT

This agreement made and entered into this day of.....1940, by and between Montgomery Ward & Co., hereinafter called the Employer, and the Warehousemen's Union Local #206, I. B. of

(Testimony of John A. Barr.)

T. C. W. & H. of America, A. F. of L., hereinafter called the Union.

Article 1. The Employer agrees to recognize the Union as sole collective bargaining agency for the employes performing work in the classifications listed below in Article 4. of this agreement. No superintendent having authority from the Employer to hire or discharge men or women shall be a member of this Union.

Article 2. The Employer agrees to give preference of employment to unemployed members of the Union and in the event the Union is unable to furnish satisfactory help upon the request of the Employer he (the Employer) may employ a non-member of the Union provided such person makes application for membership in the Union within seven (7) days after taking employment.

Article 3. Section 1. Eight (8) hours within nine (9) consecutive hours shall constitute a day's work. Forty (40) hours consisting of eight (8) hours, Monday to Friday inclusive, constitutes a week's work.

Section 2. Straight time shall be any eight (8) consecutive hours from 8:00 a.m. to 6:00 p.m. Monday to Friday inclusive. All other time shall be at the overtime rate as established in Article 5 of this agreement.

Section 3. Any work performed on any of the following named holidays shall be at the overtime

(Testimony of John A. Barr.)

rate of time and one-half as established in Article 5. of this agreement;—Saturdays, Sundays, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day and Christmas Day.

Article 4. The following shall be the minimum wages paid in their respective classifications:

STOCK ROOM

Stockman	\$35.00	per week
Assistant Stockman	32.50	" "
Stock Helper, Male.....	30.00	" "
Stock Order Filler, packer & checker.....	30.00	" "
Warehouseman	33.50	" "

SCHEDULE ACTIVITY

Heavy Pit Order Filler.....	\$32.50	per week
House Sale Order Filler "C" line.....	30.00	" "
House Sale Order Filler "A" line.....	28.50	" "
Order filler, checker, wrapper, women.....	25.00	" "
Packer, men	28.50	" "
Packer, women	25.00	" "
Correction clerks, men.....	32.50	" "
Correction clerks, women.....	27.50	" "
Production Control Clerk.....	30.00	" "
Outline Clerk	25.00	" "
Mailable Pit Order Filler & Part lot packer	30.00	" "

EXAMINATION

Examiner "C" line.....	\$35.00	per week
Assistant Examiner "C" line.....	32.50	" "
Examiner "A" & "B" line.....	27.50	" "
Stock preparation, women.....	25.00	" "
Stock preparation, men.....	28.50	" "

(Testimony of John A. Barr.)

PREFERRED ATTENTION ORDER UNITS

Completer	\$28.50	per	week
Packer	30.00	"	"
Biller	28.00	"	"
Preferred Attention Sealer.....	27.50	"	"

PACKING & BILLING

Sorter	\$22.50	per	week
Completer	27.50	"	"
Packers, men	30.00	"	"
Packers, women	27.50	"	"
Scalers, Multiple	22.50	"	"
Scale, single	25.00	"	"
Scalers, pit scaler.....	27.50	"	"
Billers, Multiple	26.00	"	"
Billers, Single	25.00	"	"
Billers, C. O. D. Biller.....	27.50	"	"
Error Correction Clerk.....	27.50	"	"
Diverted Order Clerk.....	27.50	"	"
Belt Inspector	22.50	"	"
Refund Control Clerk.....	25.00	"	"
Large Refund Control Clerk.....	25.00	"	"

SHIPPING & RECEIVING FLOOR

Shipping & Receiving Clerks.....	\$35.00	per	week
Checker	37.50	"	"
Ele. Opr. & Car unloading.....	32.50	"	"
Car Loaders	37.50	"	"

PACKAGE OPENING UNIT

Sign-up clerks, women.....	\$27.50	per	week
Sign-up clerks, men.....	32.50	"	"
Stock preparation girls.....	25.00	"	"

RETAIL CITY DELIVERY

Shipping clerks	\$35.00	per	week
Receiving Clerks	35.00	"	"
Checker	35.00	"	"

(Testimony of John A. Barr.)

BELT ROOM CUTTING UNIT

Stockman	\$35.00	per week
Assistant stockman	32.50	“ “
Pipe shop order filler & stockman.....	35.00	“ “
Porters	27.50	“ “
Technical Shade Cutter.....	35.00	“ “
Technical Asst. Shade Cutter.....	32.50	“ “
Linoleum Cutter	35.00	“ “
Crater	30.00	“ “
Tailoresses	26.50	“ “
Head Tailoresses	28.50	“ “

Any wages now being paid above the minimum provided for herein shall not be reduced for any cause. Adjustment of disputes or differences on classifications will be settled through the Board of Adjustment provided for in Article 13. of this agreement.

Article 5. The overtime rate of pay shall be time and one-half ($1\frac{1}{2}$). No trading of overtime for time off.

Article 6. In the event that the Employer does not at present employ a working foreman, forelady, supervisor, or instructor, it is agreed that if one is employed, he or she shall receive fifty (.50) cents a day above the rate of pay for the highest classification herein contained.

Article 7. If employes are worked over five (5) consecutive hours without a meal period, all time in excess of five (5) hours without such meal period shall be at the overtime rate. Meal periods shall be so arranged as not to interfere with the normal operation of the business.

(Testimony of John A. Barr.)

Article 8. Section 1. There shall be no discrimination against any employes for Union activity or membership.

Section 2. The employer shall have the right to discharge any employes for insubordination, drunkenness, incompetence or failure to perform work as required or to observe safety rules and regulations and the Employer's house rules, which shall be conspicuously posted. In the event any employee feels he or she has been discriminated against or unjustly discharged, he or she shall have a right to review his or her case by the Board of Adjustment, as set forth in Article 13 of this agreement. In the event the Board of Adjustment finds the discharge to have been unjustifiable, said Board shall order reinstatement of such employee with full payment of lost time.

Section 3. Where the employer requests an additional medical examination of an employee, and there is doubt in the mind of the employe as to the proper diagnosis of his or her case, the Union shall request a further examination by an impartial examiner, (to be paid by the Union). In the event both medical examiners do not agree in their findings it is further agreed that a third examiner shall be called for a final decision; said expense to be equally divided between the Employer and the Union, and the employee either returned to work with back pay or dismissed. New employees must

(Testimony of John A. Barr.)

have physical examination within thirty (30) days.

Article 9. Lay-offs: If the work becomes slack and the Employer deems it advisable to reduce forces, employees who have been employed less than six (6) months shall be layed off first. If after all the men or women who have been employed less than six (6) months have been layed off, the Employer considers it desireable to take further measures, further lay-offs shall be in accordance with the seniority of the various employees on each floor.

In rehiring, those employees layed off last will be rehired first, and no new employees will be hired until the list of former employees is exhausted.

Seniority at Montgomery Ward & Company's main store in Portland will be as follows: Employes now employed will have preference over employees transferred from other warehouses regardless of length of time employes at other warehouses might have with the Company. Any employees transferred from other warehouses to the main store must draw the scale provided in this agreement for extra employees. In case of lay-offs employes coming on from other warehouses will be the first to be layed off.

Article 11. Strikes: The Union agrees not to engage in any strikes or stoppage of work. The Employer agrees not to engage in any lockout. Any action of the employes leaving jobs for their own protection in cases of a legally declared strike by some Union directly working on the job, if said strike is sanctioned and approved by the Portland

(Testimony of John A. Barr.)

Central Labor Council, shall not constitute a violation of this clause of this agreement.

Article 10. Employers shall adhere to their past practice of granting vacations but in no case shall a vacation be less than one week with full pay each year.

Article 12. Any person receiving wages or conditions or periods of vacation in excess of the minimums set forth herein shall not have any such benefits taken away from them, because of the signing of this agreement. All holidays, **when not** worked, shall be paid for as an eight hour day. When holidays are worked, the rate of pay shall be time and one-half ($1\frac{1}{2}$).

Article 13. A Board of Adjustment is hereby created to be composed of two (2) representatives of each contracting party. Said Board shall organize at once and shall elect a Chairman and Secretary and shall have the power to adjust any differences that may arise between the parties hereto regarding the meaning or enforcement of this agreement. Said Board shall meet for consideration of all matters that may be referred to it, within forty-eight (48) hours subsequent to receipt by its Secretary by notice of same. The Board's decision shall be signed by a majority of the Board. If the Board cannot agree to any question referred to it within forty-eight (48) hours, they shall then choose a fifth member who shall have no connection with either contracting party and the decision of a majority of

(Testimony of John A. Barr.)

the Board of five shall be final and binding on both parties. Pending the decision of any question referred to the Board, work shall be continued in accordance with the provisions of this contract.

Article 14. This agreement shall go into effect this day of, 1940, and remain in effect until the day of 194....., and thereafter subject to thirty (30) days' notice of a desire to change by either party. If notice to desire to change or modify this agreement is served as hereinabove provided, negotiations shall start twenty (20) days from the date such notice is received.

In Witness Whereof, the parties hereto have caused these presents to be executed the day and year first hereinabove written.

MONTGOMERY WARD &
COMPANY

By
.....

WAREHOUSEMEN'S UNION
LOCAL #206

By
.....

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Trial Examiner Bokat: On the record. Proceed with cross examination.

(Testimony of John A. Barr.)

Cross Examination

Q. (By Mr. Landye) Mr. Barr, you are an attorney-at-law, as well as a labor relations director, is that correct? [506]

A. I am an attorney-at-law, yes, sir.

Q. You are admitted to practice in the state of Illinois, I imagine?

A. Yes; also the State of Indiana.

Q. Indiana. And you have worked for the company since 1937, is that correct?

A. Well, I have,—my connection with Montgomery Ward extends back of 1937.

Q. I see. And what were you doing before 1937?

A. I was first associated with Montgomery Ward in the spring of 1933 as an attorney.

Q. I see. And then you were with them, were you, continuously until 1937?

A. Not full time, no.

Q. I see. But 1937 you started in as a full time attorney, is that correct?

A. No, I did not. I have been serving full time with Montgomery Ward now since October of 1938.

Q. Of 1938? A. Yes, sir.

Q. And since 1940, you have been the head of the labor relations is that correct?

A. The handling of labor relations has been my definite responsibility since that time.

Q. What was that date in 1940? [507]

A. I said about September 1.

(Testimony of John A. Barr.)

Q. About September 1? A. Yes, sir.

Q. And you have considerable men working under you, I suppose? A. No, not so very many.

Q. Well, roughly, how many?

Mr. Ball: Do you refer to labor relations? Were you?

Mr. Landye: Just under labor relations, yes.

A. Oh, there are approximately ten people working under my supervision, but none of those folks are engaged solely in labor relations work.

Q. (Mr. Landye, continuing) I see. They are other attorneys?

A. That is right. They are all attorneys.

Q. The company policy as to labor relations, as related by you, who has laid down that policy?

A. Well, that is the policy of bargaining with employee representatives who represent the majority of the employees and the proper bargaining unit; is that what you refer to?

Q. No. You misunderstood me.

A. Well, that is the only policy that I recall testifying to.

Q. First, as to your entire attitude as you expressed it, as to the various provisions of contracts, who lays down the policy of the company? For instance, your attitude on——

A. (Interposing) Oh, I don't know as we have any policy as regards the various provisions of contracts. [508]

Q. Oh, you don't have a policy?

(Testimony of John A. Barr.)

A. Well, Mr. Examiner, I would have to ask for a clarification of the meaning of the word "policy" in order to answer that question.

Trial Examiner Bokat: You may do so.

Q. (Mr. Landye, continuing) The attitude that you express definitely as to what you consider a closed shop to be. Is that your attitude, or the attitude of the company, or both?

A. I would say that it is both.

Q. I see. Would you call that, then, a company policy?

A. No, I would call that a definition.

Q. I see. But it is definitely the attitude of the company, is that correct?

A. No, I would say that that is the manner in which we define the term "closed shop".

Q. I see. Now, is there a company policy in regard to seniority?

A. Oh, again, Mr. Examiner, I will have to ask for the meaning of the word "policy". I don't understand what the attorney is trying to get at.

Trial Examiner Bokat: If you don't understand the question, you may so state.

The Witness: I so state.

Mr. Ball: I suggest that you can simplify it by a definition of the practices.

Mr. Landye: Just a minute. [509]

Q. (Mr. Landye, continuing) Now, in Exhibit 10, you state this, signed by you: "With regard to

(Testimony of John A. Barr.)

Article 9, I would feel perfectly free to explain to the Union that the Company has no seniority policy in the sense that seniority is understood by the Union, and we do not propose to adopt such a policy. When pushed for a statement of your position on this subject, I have often stated that the company's policy is rather an intangible one, and difficult to reduce to words. However, it may be stated somewhat as follows: 'The Company will determine questions of lay-offs and rehiring on the basis of various factors which the Company considers properly pertinent to the appraisal of individual employees, including such factors as seniority, proficiency, adaptability, flexibility, promotability, ability, age, physical fitness, marital status.' " I fully agree with one union who has described the statement of the above as "What a mess of words."

Now, what I am asking you, Mr. Barr, is this: you have a quote in here of your letter, and it is: "As to the company policy, the company will determine the question of lay-offs and rehiring on the basis of various factors", and so forth, which I read to you. Whose quote is that?

A. That is mine.

Q. Well, this is a letter by you and a quote within a quote. I want to know where these quotes come from?

A. May I refresh my recollection by seeing that?

[510]

(Testimony of John A. Barr.)

Trial Examiner Bokat: Go ahead.

Mr. Landye: Yes, certainly; certainly.

(Whereupon the document referred to was handed to the witness.)

The Witness: The statement which you read which is included in quotation marks on page 2 of the exhibit 10 is merely what it says it is. It is preceded by the words, "However, it may be stated somewhat as follows", and then the statement follows in quotes,—that is, as I state how it may be stated.

Mr. Landye: I see.

The Witness: I was not quoting from any other document, or anything of that sort.

Q. (Mr. Landye, continuing) Oh. But you have stated in this letter what the company policy is as to seniority, in your own words. Now, I am asking you as to this company policy and seniority that you, yourself, call company policy in this letter.

A. Yes.

Q. From where did you derive that policy; that is what I am trying to find out.

A. From the management of the company.

Q. Now, in the management, what specific individuals do you mean?

A. The officers of the company.

Q. The Board of Directors? [511]

A. No, the officers.

Q. Mr. Avery? A. He is one of them.

(Testimony of John A. Barr.)

Q. Who else?

A. Principally that statement,—with reference to that statement, I would mean by the management, Mr. Avery, who was President, the vice-presidents of the company who are located in Chicago, the secretary and personnel director who are located in Chicago.

Q. Now, on company policy as stated in your seniority, and your attitude, we will call it to make it easier,—on union shop and the signing of agreements and that type of thing, your general labor relations, do you discuss that with the officers of the company?

A. Yes, sir; I have discussed it with them.

Q. You have discussed it with them?

A. Yes, sir.

Q. And their attitude is the same as you have expressed it on the stand, is that correct?

A. I feel that it is, yes.

Q. Well, is there any difference?

A. That is, I believe that on the stand I expressed their thinking on the subjects that I testified to.

Q. And this entire thinking or philosophy is the attitude of your company as far as the officers are concerned? [512]

A. To the best of my knowledge, it is, yes, sir.

Q. I see. Have you, yourself, had any hand in formulating this policy?

A. Oh, possibly to a very slight degree.

(Testimony of John A. Barr.)

Q. A slight degree? A. Yes, sir.

Q. In short, the policy is laid down by the officers and you take it, is that it? You take it, and execute it?

A. It is determined by the officers.

Q. You, of course, have had considerable experience in labor negotiations, isn't that correct?

A. I have had some experience. It would be a matter of experience as to whether it is considerable, I presume.

Q. Well, for how long a time?

A. Since the spring of 1937.

Q. Since the spring of 1937? A. Yes, sir.

Q. You have negotiated contracts, is that correct? A. Yes, sir.

Q. And participated in cases before the Labor Relations Board? A. Yes, sir.

Q. Both representation and unfair labor practices? A. Yes, sir.

Q. Now, your statement on what you termed the closed shop, that preferential hiring, or union shop and closed shop, all [513] were under the same thing as "closed shop",—is that your attitude or the attitude of the company?

Mr. Ball: I object. The witness has answered that the meaning of that word as we use it among ourselves is a definition and not an attitude.

Q. (Mr. Landye, continuing) Well, is that your definition? A. Yes, sir.

(Testimony of John A. Barr.)

Q. Or the definition of the company; I will change it.

A. I will say that it is both.

Q. It is both? A. Yes, sir.

Q. Have you ever read any books on labor relations?

A. I have read from books on labor relations.

Q. What ones?

A. Commons & Andrews; Commons, Watkins, Murray, I believe.

Trial Examiner Bokar: I don't believe the reporter knows how that is spelled.

Mr. Ball: Commons is C-o-m-m-o-n-s; Commons & Andrews is the first.

Q. (Mr. Landye, continuing) And Watkins, you have read that book?

A. I say I have read from those books. I wouldn't say that I have read all of any of them.

Q. That is the only ones that you have read?

A. Those are the only ones that I recall at this time on [514] that subject.

Q. And do you derive from any of those books your definition of the closed shop as you have stated from the stand?

A. I wouldn't say that it is derived directly from any of those books. However, they have contributed to it.

Q. And so that your statement is that in John R. Commons' books he defines the closed shop the way you define it?

(Testimony of John A. Barr.)

A. No, that is not my statement.

Mr. Ball: I think that is out of the path, to be quoting the witness.

Trial Examiner Bokat: I don't think that he so stated it. I will sustain the objection as to the form of the questions.

Mr. Landye: He has testified as an expert. I am just trying to find out a few things.

The Witness: Thank you.

Q. (Mr. Landye, continuing) Your statement as to your definition of what the closed shop was, did that come from any of those books?

A. Well, I recall, for example, that Watkins, in his text states that, strictly speaking, the term "closed shop" means a shop which is closed to union members; in other words, a shop which will not employ union people is, strictly speaking, a closed shop. However, in later years the term has been extended, as I understand it, to include shops where some requirement of union membership in some form is a necessary [515] factor in the employment of the individual.

There is, for example, the closed shop with the open union, and the closed shop with the closed union. In other words, "closed shop" is a term which is a broad term which embodies various forms of union membership requirements, some of which, as I understand it, are commonly referred to by some people as a union shop, as a preferential hir-

(Testimony of John A. Barr.)

ing hall, as a closed shop or some other such terminology.

Q. Now, this last part is your own idea, not from Mr. Watkins' book, is that correct?

A. Well, I don't purport to quote Watkins in any respect.

Q. I see.

Now, on the question of your attitude, as you call it, or statement on counter proposals, and how to bargain, your instructions to Mr. Powell, is this correct,—I want to get your correct.

A. And I want you to, too.

Q. Yes. That counter proposals should not be made in written form in answer to a union's proposals?

A. In the absence of some special circumstances which certainly did not exist in the Portland case, that is right.

Q. What would those special circumstances be?

A. There were no circumstances existing in the Portland situation, as I understand it, which would so qualify it.

Q. What would the special circumstances be?

[516]

Mr. Ball: I object to that as calling for a hypothetical situation of fact, and the answer to that wouldn't have any bearing on this case. I have hesitated to interpose objections to an examination which I think has gone rather far afield from the purport of the direct, but I think that they are

(Testimony of John A. Barr.)

getting into the field of rank hypothesis here, rather than confining ourselves to the issues.

Trial Examiner Bokat: Well, the answer is meaningless to me unless I understand what the witness means by "special circumstances." He might be able to illustrate it very clearly. I don't know whether it is going to help me to determine whether or not this respondent failed to bargain collectively or not. Maybe it won't. I realize that some of this discussion is theoretical, but it was brought out mainly on cross examination. But I hesitate to limit Mr. Landye in his examination.

Would you read the question back, Mr. Reporter?

(Whereupon the question referred to was read as follows:

"Q. (Mr. Landye) What would the special circumstances be?")

Mr. Ball: I object to this question until it is shown that the witness had in the testimony in chief specific situations in mind at that time, by the use of the words "special circumstances."

Trial Examiner Bokat: I am merely asking him to illustrate what he means by "special circumstances". He has used the [517] definition,—I have not.

The Witness: I wouldn't say that in no case should a written counter proposal be made in the bargaining process. Now, just what the circumstance might be, that would call for a counter proposal,

(Testimony of John A. Barr.)

might depend upon a lot of things. I don't feel that I can answer that question of just what specific circumstances would arise that in my opinion would make a counter proposal advisable or necessary.

Q. (Mr. Landye, continuing) I see. So, to make it short, none of those special circumstances have ever arisen, as far as you are concerned?

A. Well, I would say that in no bargaining in which I have had any connection, have I felt that it was advisable, and certainly not necessary to make a written counter proposal when the parties were as far apart in the matters being bargained, as the parties were in Portland in the instances under discussion.

Q. Have you ever made a written counter proposal?

A. As I understand a counter proposal, no. And it is hard for me to conceive,—if not impossible for me to conceive, of any circumstances where such a written counter proposal would be advisable or necessary, but as I stated before, I hesitate to say that one should never be made, because something which I cannot foresee might be present in some bargaining which would make it the proper thing to do. But that is such a remote [518] possibility that, as I stated before, I can't conceive of what it would be.

Mr. Landye: I make a motion to strike the whole last part of the answer as not responsive. I asked him the question of whether he ever made a counter proposal.

(Testimony of John A. Barr.)

Mr. Ball: I move to interpose this objection to the question because the direct testimony of this witness was what was a counter proposal depended upon the whim of the labeller, if he wanted to call something a counter proposal. And I think that the witness' answer presupposes a particular definition which might be identical with that of the questioner.

Trial Examiner Bokat: I will overrule the motion and the objection, and let the answer stand as given.

The Witness: Now, in further explanation of that answer, if I may complete my answer,—I have on many occasions made a full statement of and full disclosure of the company's position on some point being bargained, or upon some demand made by a union and it may be that that statement of the company's position, which after all is about all that can be said on the subject, is a counter proposal. That depends upon one's individual definition of a counter proposal. I don't consider it as such.

Q. (Mr. Landye, continuing) Well, let's clear this up. Have you ever taken a contract, or taken a piece of paper, now, and written down on it, section by section, a proposal to a union in [519] answer to a proposal of theirs as to what the company would accept, section by section, and submitted it to a union?

A. Well, I have sat down with a piece of paper and written a contract with a labor organization, if that answers your question.

(Testimony of John A. Barr.)

Q. I will ask if you ever submitted to a labor organization, section by section, what the company would consider in the case?

A. Well, I said that I had written a contract with a labor organization, which, of course, was signed and executed by the Union. It had to be submitted to them.

Q. Was that later signed by the Union?

A. Oh, yes; yes.

Q. I see. What union was that?

A. Well, that was an A F of L affiliate. I believe they called themselves a Machinists' Union, or the International Association of Machinists, associated with the American Federation of Labor.

Q. Have you signed contracts with any unions in the mail order or retail stores in the United States?

A. Well, this particular contract that I just referred to was in a factory operated by the company. I know of no written contracts that are in existence at a retail store or mail order house.

Q. Yes. So, to clear that up, throughout the United States [520] Montgomery Ward does not have any contract with any union representing either the Retail Store Employees or the Mail Order Employees?

Mr. Ball: Well, come now,—that is not a fair statement of the witness' testimony, and it involves a conclusion and opinion of the questioner, and for that reason, I object to it.

(Testimony of John A. Barr.)

Trial Examiner Bokat: Well, I think his answer is clear.

Mr. Landye: I think that is correct.

Q. (Mr. Landye, continuing) Now, as stated in your direct examination, that you instructed Mr. Powell to never agree on one section at a time, is that correct?

A. As an agreement, yes, sir.

Q. As an agreement?

A. Yes; a trade agreement can only be agreed to as an entirety, as I said.

Q. And so, for instance,—you have a Mr. Barth?

A. Yes.

Q. To be specific, on what is the title of Board's Exhibit 3, where appears 14 different sections, your instructions were never to agree section by section, is that correct?

Mr. Ball: Oh, I object to this as not being a fair statement of the witness' testimony. The witness' testimony was that they couldn't take out isolated paragraphs or sections of a contract to make a final agreement embodying only the single section. I think that the witness' testimony is clear on that, and that it is a misquotation here in framing the question as it is. [521]

Mr. Landye: I so understood it, and I wish to have that cleared up.

Trial Examiner Bokat: The witness can state in reply to the question whether that is,—Mr.

(Testimony of John A. Barr.)

Landye's understanding of it is correct or not. Do you want to hear the question again?

The Witness: I have stated to Mr. Powell that a good bargainer would not bind himself by agreement to any one section or clause of a contract while other sections and clauses,—as to other sections and clauses, there still remained substantial disagreement. That is, to agree to one section, while there existed substantial disagreement as to other was not smart bargaining, in my opinion.

Q. (Mr. Landye) So that the whole contract would just have to be agreed to at one time?

A. So far as an agreement is concerned, yes, sir.

Q. It would all just have to be agreed to at one time, is that correct?

A. So far as an agreement is concerned, yes. Of course, the separate sections and clauses could be negotiated and bargained separately, but they could only be agreed to as an entirety.

The reason for that, I think, is obvious because of some change that might be made in one of the other proposals in the contract, the bargainer might desire to make some change in the specific clause under discussion, the later objection not being [522] apparent at the time because the change to be made later in the other provision would, of course, not then be known.

Q. Now, you say Mr. Powell was in charge of labor relations here on the Pacific Coast, is that correct?

A. Yes, sir.

(Testimony of John A. Barr.)

Q. I want to get to the authority. Did Mr. Powell have the authority to grant any increases in wages?

A. No, not alone.

Q. Not alone? A. No, sir.

Q. Would Mr. Powell, in fact, have any authority to change any of the existing conditions, as they existed at the time at the plant, by himself,—such as wages, hours, conditions and everything?

Mr. Ball: I object to this question because the statement is simply,—or the claim has simply been made that Mr. Powell is empowered to negotiate and not to administer to the house and dictate any changes in hours.

Trial Examiner Bokat: You may answer the question.

The Witness: Will you read the question again, please?

(Last question read.)

A. By himself, no, he would not.

Mr. Landye: He would not.

Q. (Mr. Landye, continuing) Now, you stated on the witness stand, as I recall, that your attitude or own position was that [523] the mail order should be dealt with as one unit and the retail stores as another unit, with the union, is that correct?

A. Yes. That is substantially correct.

Q. And that is correct as of today, is that right?

A. That is right.

Q. Then you have not changed your mind since the Labor Board ruled last August that that was not a correct policy

(Testimony of John A. Barr.)

A. I have not changed my mind since last August.

Q. You have not? A. No, sir.

Q. I see.

A. I am not at all sure that the Labor Board ruled that that was not a correct policy.

Q. But you have not changed your mind as to that policy since 1940? A. No, not at all.

Q. I see. Now, with reference to Respondent's Exhibits 11 and 12,—have you read these ads? I will take one and you take the other. They are both the same. (Mr. Landye handed a newspaper sheet to the witness)

A. Yes, sir; I have read them.

Q. (Mr. Landye) Do you know who drafted those statements, as appear in Exhibits 11 and 12 of the Respondent? A. Yes, sir.

Q. Who did? [524]

A. I made the final draft.

Q. You made the final draft? A. Yes, sir.

Q. And these were made March 22, 1941, and one states this: "Ward's Portland Store and Mail Order House were picketed December 7, 1940. This was the result of Ward's refusal to agree to a closed shop. No dispute existed as to wages and hours".

A. Yes, sir.

Q. That is your statement?

A. Yes, it is.

Q. I see. And you drafted a statement like that, knowing what went on in the negotiations?

(Testimony of John A. Barr.)

A. Well, I drafted the statement, and I feel that I have a rather general knowledge of what went on in the negotiations, yes, sir; although I was not personally present.

Q. Well, did you know that there was a dispute over wages and hours?

A. No, sir; I know that,—at least it is my knowledge that on November 25, 1940, at a meeting in Oakland, a Mr. White, a Mr. Thomas White, made the statement to Mr. Powell, I am informed, that unless the company would agree to a closed shop at Portland, Oregon, on or before noon of Thursday, November 28, that the unions for which he spoke would take concerted economic action against Montgomery Ward in the eleven western [525] states.

Montgomery Ward, as stated in the ad, failed to agree to the closed shop as demanded by Mr. Thomas White, and a few days later, the picket line was placed around the Portland store and house as stated in the ad.

Mr. White—

Q. (Interposing) Now,—excuse me. You are still explaining your answer?

A. Yes, I am.

Mr. White, a few days after that, told me personally, in a conversation in Oakland, California, that he was still then speaking with full authority for the Warehouse and Retail Clerks' Locals at Portland, as well as the Warehousemen and Retail Clerks' Unions at Oakland, and he said to me, "We

(Testimony of John A. Barr.)

have no dispute with you over either wages or hours."

Q. Now, you were in touch, were you not, with Mr. Powell, all of this time?

A. I was in frequent contact with Mr. Powell.

Q. Yes. Didn't you know that at the meetings of December 14 and 16, that the parties could not agree on wages?

A. Well, whether I knew that or not, the ads as you will note, state that the house was picketed on December 7th, which antedates the time referred to by you in your question and state that no dispute existed as to wages or hours at that time. It is my understanding that since the date on which the house was picketed, [526] that certain demands have been made as to wages, yes, sir.

Q. Well, didn't you know that before the place was picketed that there were wage demands made on the company?

A. Well, as I just stated to you a moment ago, Mr. White, within two or three days after December 7th, the date we are talking about here, stated to me personally, on behalf of the Warehouse and Retail Clerks' Unions of Portland, that no dispute existed as to wages or hours.

And he said to me, "We are not making any claims on you with regard to either wages or hours."

Mr. Landye: I make a motion to strike the whole answer as not responsive.

(Testimony of John A. Barr.)

Trial Examiner Bokat: It is partially responsive and not entirely.

Mr. Reporter, will you read the question, please?

(Whereupon the question referred to was read as follows:

“Q. (Mr. Landye) Well, didn't you know that before the place was picketed that there were wage demands made on the company?”)

Trial Examiner Bokat: That is prior to December 7, 1940; did you know that?

Q. (Mr. Landye, continuing) Did you know that wage demands had been made on the company?

A. I understood that certain contracts had been submitted to the company. I believe they have been identified here as Board's [527] exhibits 3 and 7, and that those contracts made some reference to wages.

Q. In fact, in your letter to Mr. Powell on November 1, you referred to those wage sections, didn't you?

A. The letter will speak for itself.

Q. Yes. Now, was there any other correspondence between Mr. Powell and yourself, except what we have here in evidence.

A. I believe there was; yes, sir.

Q. Do you have that?

Mr. Ball: Well, I object to this. The question of whether he has this correspondence has **nothing** to do with the issues in this case.

(Testimony of John A. Barr.)

Trial Examiner Bokar: He just asked whether he has any.

Q. (Mr. Landye, continuing) Do you have any other correspondence with Mr. Powell, or Mr. Powell with you, in respect to the situation with the labor unions with Montgomery Ward at Portland, and instructions by you to him or requests for instructions by him to you?

A. Well, that question involves several things.

Mr. Ball: Yes. I move that the question be separated and put in proper form.

Trial Examiner Bokar: Yes.

Q. (Mr. Landye) Do you have in your possession any letters besides what are in evidence between you and Mr. Powell, relating to the labor situation here in Portland? [528]

A. I have some letters,—pardon me.

Mr. Ball: I object to the question unless it is made specific as to what dates.

Mr. Landye: No, if the Court please.

Trial Examiner Bokar: The question is general. I think that it is clear, involving the labor dispute here. I assume there was a dispute here. If the witness doesn't understand it, he can so indicate.

The Witness: I didn't say that.

Trial Examiner Bokar: No, you did not. I say, if you don't understand it, you can so indicate. I think that it is clear, and I will let it stand.

The Witness: Shall I answer it?

(Testimony of John A. Barr.)

Trial Examiner Bokat: Yes.

A. I have some letters from Mr. Powell with regard to these matters.

Q. (Mr. Landye) I see. Could you produce those here? A. Physically?

Q. Yes. A. Yes.

Q. I ask that that may be done. I don't ask that he be here to identify them.

Mr. Ball: Well, the respondent objects to the production of these letters as being the privileged correspondence of the respondent.

Trial Examiner Bokat: Well, I am afraid that you have [529] opened the door. You have come in here and produced certain letters involving certain instructions which you felt were not confidential. Now, you take the position that certain other letters involving the same dispute are confidential. It may be that they are. I don't know whether it will help throw any light on the situation to help me determine the facts or not, Mr. Ball.

Mr. Ball: Well, the request made is a general one.

Trial Examiner Bokat: I have not directed you to produce them. I am sort of thinking out loud.

Mr. Ball: Well, may I direct your attention, Mr. Examiner, that this request is a broad one. There might have been many letters that passed between Mr. Barr and Mr. Powell which do not relate to the same matter, but which have the same probative effect as the letters which are produced.

(Testimony of John A. Barr.)

Trial Examiner Bokar: That may be true. I don't know what has passed between the parties.

Mr. Ball: The request for the production is very sweeping, and totally without justification, and no foundation laid.

Trial Examiner Bokar: I think there has been a foundation laid in a general way. The witness has admitted that other letters, requests for instructions, I believe, were received by him from Mr. Powell. Am I correct in that, Mr. Barr?

The Witness: I said other letters were received. I didn't interpret them as being requests for instructions or otherwise. [530]

Trial Examiner Bokar: Well, Suppose you develop that a little further, Mr. Landye? You can make your request more specific if you lay a foundation for it.

Mr. Landye: Yes.

Q. (Mr. Landye, continuing) Do you have in your possession any other letters relating to the general labor dispute here in Portland with Montgomery Ward in which you instruct Mr. Powell as to how he should go about the negotiations?

A. No, I have no letters in my possession in which I give any instructions to Mr. Powell.

Q. Do you have in your possession any letters from Mr. Powell to you?

A. The only letters I have in my possession would be from Mr. Powell to me.

(Testimony of John A. Barr.)

Q. Yes. Well, do you have some of those requesting instructions and advice?

A. I believe not, to the best of my recollection. Mr. Powell, I think, knew that any instructions or advice that I had would be forthcoming without his requesting it.

Q. I see. Well, do you have in your possession any letters from Mr. Powell to yourself in the nature of reports upon the Montgomery Ward situation here in Portland, the labor dispute?

A. Yes, I do have.

Mr. Landye: May I ask that those be produced?

Mr. Ball: I renew our objections to the production of those [531] reports, for the reasons that I have urged before, that they relate to a different matter, and there has been no waiver of any privilege as to the production of such documents here.

Trial Examiner Bokar: Suppose you continue. I want to think about the request. I will reserve decision on it in the meantime. You may continue with your cross examination.

Mr. Landye: May I make a statement before you consider that?

Trial Examiner Bokar: Yes.

Mr. Landye: Our purpose in that, if the Examiner please, is this: that certain letters were brought in, to which I objected at the time as hearsay; but they were in, nevertheless, setting out for the purpose of showing instructions, as they stated, to the general attitude and mind, as they call

(Testimony of John A. Barr.)

it, of the Company. That is the way they got around the hearsay rule.

Therefore, I am merely asking for the rest of the letters to develop the whole thing. I don't want just a few selected letters. I want to look at the whole picture. And I am going under the rule that when one letter is put in such as this, you have to bring them all in. I object to——

Trial Examiner Bokat: (Interposing) I think there is a great deal of merit to the request, but I will still think about it.

The Witness: Of course, if I may make a statement in explanation of the facts, Mr. Examiner?

[532]

Trial Examiner Bokat: Yes, I would like to get it as fully as possible.

The Witness: I would like to say, with regard to laying the full picture on the table, that the full picture goes far beyond the letters, because by far most of my contacts with Mr. Powell were oral.

Trial Examiner Bokat: Oh, yes. I think that we understand that all right.

Mr. Ball: And therefore subject to examination.

Trial Examiner Bokat: Yes.

Mr. Landye: Now,——

Trial Examiner Bokat: I think that Mr. Landye's point, though, is still a good one,—that if the respondent seeks to select certain correspondence to put in evidence, other correspondence dealing with the same subject, particularly where objection

(Testimony of John A. Barr.)

is made to the introduction originally, and then a request is made for the introduction of the balance on the same subject. It sounds fair and equitable to me, without trying to be too technical about it.

Q. (Mr. Landye, continuing) Now, you stated in direct examination that your attitude, or policy, or whatever it was, was,—on grievances, you stated, I remember specifically, was to deal with union and non-union employees and grievances of the same, is that correct?

A. Well, I said that the management of the company was at all [533] times glad to receive and consider the grievance of any individual employee, or any group of employees, and that when any grievance was presented to the management, that it would be considered, and, if found to be justified, corrective action would be immediately taken, and that that corrective action would be taken regardless of whether the grievance involved a member of a labor organization or a non-member of a labor organization.

Q. I see. Now, I just wanted to get that straight. That attitude on grievances, would your attitude be to also deal with a union grievance committee?

A. Well, I would say that it would be proper to deal with the union grievance committee if the union represented the majority of the employees of the unit involved. I would say that it would not be proper to deal with such a committee if the union

(Testimony of John A. Barr.)

represented but a minority of the employees in the unit of the union involved.

Q. Now, do I understand this correctly,—that the Company will deal with a union that is certified by the National Labor Relations Board, is that correct?

A. I don't understand the question, Mr. Examiner. I don't know what is meant by the word "deal".

Q. Well, they will negotiate, then?

A. Oh, yes, certainly.

Q. And you will not deal with any,—do I take it, then, that [534] you will not deal with any other union that is not certified by the National Labor Relations Board? A. I didn't say that.

Q. Well, is that correct? A. No.

Q. I see.

A. I said that we would deal with any union which represents a majority of the employees in a proper bargaining unit. Certification by the National Labor Relations Board is a very satisfactory manner of establishing such majority representation but not the only manner, probably.

Q. I see. Now, these attitudes that you have expressed here, have full, I think,—strike the question.

Trial Examiner Bokst: I will declare a ten-minute recess at this time.

(Whereupon, at this time there was a short recess, after which proceedings were resumed as follows:)

(Testimony of John A. Barr.)

Trial Examiner Bokat: The hearing will come to order, please.

Q. (Mr. Landye, continuing) Referring to Exhibit,—Respondent's Exhibit 16, Mr. Barr, and showing you now the contract attached, I see some pencilled notes. Do you know whose notes those are? A. Yes, I do.

Q. Whose notes are those?

A. They are mine. [535]

Q. Those are your notes?

A. Yes, I used the contract attached to Respondent's Exhibit 16 as my office copy of the Warehousemen's Contract.

Q. And the pencilled notes, then, which are attached to Exhibit 16,—the pencilled notes showing on what is headed "agreement", which will be about the third page, they are all of yours, are they? A. They are, yes, sir.

Mr. Ball: Perhaps I haven't thoroughly familiarized myself with that. (Reading exhibit)

I didn't know that you wanted to encumber the record with that.

Mr. Landye: Oh, I wanted it encumbered that way.

Mr. Ball: O. K. That is fine.

Q. (Mr. Landye) Now, just one more question. Referring to Exhibit,—Respondent's Exhibit 14, will you tell me whose pencilled notes appear there on the second page?

A. Yes, those are also my notes.

(Testimony of John A. Barr.)

The form of contract attached to Respondent's Exhibit 14 I use as my office working copy of the Retail Clerks' submitted contract.

Q. I see. You are familiar, I assume, with all of these statements made as to what Mr. Powell would agree with in those negotiations?

A. You mean statement made by Mr. Powell in the negotiations? [536]

Q. Yes.

A. Oh, as I was not personally present, I only know what has been reported to me.

Q. I see. Well, taken from your own viewpoint, have you ever made any concessions to a union, or proposals to a union except that which was actually in effect at Montgomery Ward at that time?

Mr. Ball: I object to that as not having any relevance to the issues in this case, and it involves the use of a word that, in itself, is ambiguous. It doesn't tend to prove or disprove any issue in this case.

Trial Examiner Bokat: If the question is clear to the witness, I will let it stand.

Read the question, Mr. Reporter, please.

(Whereupon the last question was read.)

Trial Examiner Bokat: May I just add to that: I assume that you are limiting the question to the negotiations in controversy here?

Mr. Landye: Yes, that is correct.

Trial Examiner Bokat: To the Portland situation?

(Testimony of John A. Barr.)

Mr. Landye: Yes, yes.

Trial Examiner Bokat: Is that question clear to you?

The Witness: No, it is not clear to me. I thought that it was before you said that, but now I don't believe it is.

Mr. Ball: Mr. Barr has not participated in these negotia- [537] tions except the one matter that he has testified to.

Trial Examiner Bokat: I know that he has not participated and I merely assumed that the question assumed the knowledge of his situation from the reports he received from Mr. Powell and the advice that he gave to Mr. Powell and the position taken by the company.

Mr. Ball: May we have the question read again, because I understood the question——

Trial Examiner Bokat: (Interposing) I understand that Mr. Landye is willing to reframe it, in any event.

The Witness: I think that I can answer the question.

Trial Examiner Bokat: Do you think that you can?

The Witness: Yes.

Mr. Landye: All right.

A. I have on many occasions made changes in the wage scale and working conditions as the result of union negotiations. I don't recall that any

(Testimony of John A. Barr.)

such changes were made in Portland, however, as a result of these particular negotiations.

Mr. Landye: That isn't in answer to the question.

Trial Examiner Bokat: The question was general.

Mr. Landye: Yes, but we are limiting it to Portland.

Trial Examiner Bokat: That is what I asked you.

Mr. Landye: I thought that I did indicate that I wanted it limited to Portland.

Trial Examiner Bokat: Well, suppose you ask another [538] question?

Mr. Landye: Well, we will see if we can get at it another way and make it a little more clear.

Q. (Mr. Landye, continuing) Did you either instruct Mr. Powell, or—yes, instruct Mr. Powell to make any concessions to the Union over and above what they were already getting here in Portland?

Mr. Ball: I object to it as the question of whether he instructed him to make concessions in general has no tendency to prove or disprove any element of this case, and the question of whether or not the various sections of the contract did, in fact change existing practices more favorably to the employees is a question that should be shown with reference to the particular discussions already in evidence.

Trial Examiner Bokat: Do you want to specify your question or particularize it more definitely?

(Testimony of John A. Barr.)

Mr. Landye: Yes.

Either concessions as to either wages, hours or working conditions.

Mr. Ball: Now, just a minute on that. I object to the question because there is testimony by Mr. Langford, for example, that there were a number of clauses which were agreeable, and as a matter of fact some of those represented changes of practice, and I think that the testimony so shows.

Mr. Landye: That is not my recollection of the testimony. [539]

Trial Examiner Bokart: It isn't mine. I mean, I don't know whether that is a fact or not. If it was, I would like to know it. Frankly, my impression has been that the clauses to which the company agreed were some slight modification in relation to those practices or conditions then existing or existing in the company prior to the strike here at Portland. If I am wrong in that impression, I wish that you would set me right.

Mr. Ball: I know right off-hand, and I think that the evidence shows, for example, that there was a tentative agreement expressed by Mr. Powell to the furnishing of *union* forms to the employees in one of these sections which was not the practice.

Trial Examiner Bokart: Well, if the record doesn't show whether the company had done that in the past, there would be no deviation.

I don't know from the record, as established now, whether the company had furnished uniforms in the past, or whether this was a new policy being

(Testimony of John A. Barr.)

embarked upon. I think the record should show that. I am totally in the dark, frankly.

Suppose you go ahead?

Mr. Landye: That is what I was trying to get at.

Trial Examiner Bokat: I know it. That is why I am permitting you to go ahead.

Mr. Landye: Yes. [540]

The Witness: Shall I answer?

Trial Examiner Bokat: Yes.

A. May I have the question read?

Trial Examiner Bokat: Mr. Reporter, will you read the question?

(Whereupon the question referred to was read as follows:

“Q. (Mr. Landye) Did you either instruct Mr. Powell, or,—yes, instruct Mr. Powell to make any concessions to the Union over and above what they were already getting here in Portland?”)

A. I never instructed Mr. Powell that he should make such concessions, or that he should not make such concessions.

Q. (Mr. Landye, continuing) I see. That matter was left entirely up to Mr. Powell?

A. It was left up to Mr. Powell and the other people with whom he was working, here in Portland.

Trial Examiner Bokat: Do you mean by that answer that Mr. Powell did have authority to make—let's use the word “concessions” or—I am

(Testimony of John A. Barr.)

satisfied with that word,—to make concessions beyond that which was already then in existence in Portland?

A. Well, what do you mean by concessions? Do you mean to make some change?

Trial Examiner Bokat: Well, you answered the question. Yes, that is what I mean. [541]

The Witness: I said that I gave Mr. Powell no instructions that he should not grant concessions or that he should grant them, either way.

Trial Examiner Bokat: I know. You have testified that he had full power to negotiate?

The Witness: That is right, full power to negotiate. And I also testified that he had no authority himself to change the hours, the wages or the working conditions in Portland.

Q. (Trial Examiner Bokat) But frankly, what puzzles me,—was he merely to listen to the union demands? A. Oh, no.

Q. And then forward them to you? Now, what does the word “negotiate” mean in this instance?

A. You see, Mr. Powell was not working on this matter alone.

Q. Yes, you had Mr. Huddleston here?

A. Mr. Huddleston. Mr. Barth was here, the manager of the retail store. Mr. Barth was working very closely with Mr. Harris, the vice-president of the company located in Oakland who had jurisdiction over all of the stores in question, and with Mr. Harris' staff in Oakland.

(Testimony of John A. Barr.)

Q. I assumed,—

A. (Interposing) Does that make it clear?

Q. Yes, I knew that they didn't have the power necessarily to bind the company without previous authorization to make any kind [542]

Mr. Ball: May I submit to your Honor that the record shows that Mr. Huddleston was the manager of the mail order house, and Mr. Barth of the retail store, and had the usual authority of such men to change conditions.

Trial Examiner Bokar: Well, if he did, I think that the record ought to show it. I don't,—I didn't get that impression, I mean the questions that have been directed as to Mr. Powell's authority.

Now, if Mr. Barth and Mr. Huddleston had more power than Mr. Powell in regard to negotiating or making any changes, I think that the record should show that.

The Witness: I testified, Mr. Examiner, if I may restate, that at the time Mr. Estabrook called upon me in Chicago, he was speaking in behalf of the Warehousemen's Union, all or at least practically all of whom were employed in the mail order house. I told him that Mr. Powell and Mr. Huddleston had full authority to negotiate with them.

Mr. Ball: Mr. Examiner, may I suggest that part of the difficulty comes from the ambiguity of the negotiations. Mr. Powell was in charge of the negotiations and that has been the testimony and the direction of the inquiry all through it.

(Testimony of John A. Barr.)

Trial Examiner Bokar: I know; it has all been directed towards Mr. Powell and that is why I asked these questions, bringing in Mr. Barth and to bring in Mr. Huddleston.

The Witness: Mr. Powell would have to consult with Mr. [543] Barth and Mr. Huddleston before a change would actually be made in the working conditions because they were the managers of the store and they were responsible for its operations.

Mr. Landye: May I get this correctly now: that Mr. Barth and Mr. Powell and Mr. Huddleston had the power, for instance to up the wages 10 per cent.?

The Witness: Yes, they did.

Q. (Mr. Landye, continuing) They had that power? A. Yes, sir.

Q. And did they have the power to grant a union shop?

A. I would say "yes", that is my opinion, that they had that authority. And I say that that is my opinion that they had the authority to do that, having in mind that they had been instructed at the time of these negotiations that the company was opposed to the closed shop which had been asked for by the union. In the absence of any contrary instructions, why, they would have authority to so agree.

Q. So, your statement is that Mr. Huddleston and Mr. Barth and Mr. Powell, together, could grant the union shop.

(Testimony of John A. Barr.)

I want to ask you, then, and refresh your memory from a letter that you wrote to Mr. Powell on November 1, quoting from paragraph 3: "The preferential hiring and the union shop provisions of article 2 are not acceptable on matters such as this where our objection is to the substance of the proposal rather than to the form in which it is presented or with respect [544] to some detail it seems to use, there is no obligation upon us to make a counter proposal. In other words, there is nothing in the nature of a union shop or preferential shop which is acceptable to us which would possibly form the basis of any kind of a proposal."

And with that letter to Mr. Powell, would you say that he and Mr. Huddleston and Mr. Barth had the power to grant a union shop here in Portland?

A. No; I said in the absence of any instructions to the contrary, they would have the authority to negotiate. However, in this particular instance, they did have instructions to the contrary.

Q. So they wouldn't have the authority, is that correct? A. Yes.

Trial Examiner Bokar: May I ask, Mr. Barr, whether these instructions you sent to Mr. Powell, —I believe the word "instructions" was used by your own counsel on direct examination. If I am wrong, will you correct me, Mr. Ball?

Mr. Ball: Yes; I said that those instructions were given to him.

Trial Examiner Bokar: Now, were those in-

(Testimony of John A. Barr.)

structions, given to Mr. Powell, given in these negotiations just as binding on Mr. Barth and Mr. Huddleston as on Mr. Powell?

The Witness: I so considered them.

Trial Examiner Bokat: All right. [545]

Mr. Ball: Your Honor, this is making it somewhat obscure.

The wage policy was discussed, and that wage discussion included both the authority and the power to make the wage adjustments.

Trial Examiner Bokat: That is right.

Mr. Landye: I think that is all.

Trial Examiner Bokat: Any redirect?

Mr. Ball: Are you going to make a ruling on those documents?

Trial Examiner Bokat: Do you wish to introduce them without the direction of the Trial Examiner? Do you want to consider that?

Mr. Ball: I think not.

Trial Examiner Bokat: You think not. Frankly, I want to give it some more thought.

Mr. Ball: My only point in raising the question now is that if the Examiner is going to rule, that they be produced.

Trial Examiner Bokat: You want time to produce them while Mr. Barr is here?

Mr. Ball: I thought it might serve the purposes of this examination.

Trial Examiner Bokat: I might discuss it with the parties off the record in order to discuss cer-

(Testimony of John A. Barr.)

tain things in regard to that procedure. If you want to leave it on the record, I will discuss it on the record.

Mr. Ball: Oh, that is perfectly all right. [546]

Trial Examiner Bokat: I will declare a recess at this time.

(Whereupon, at this time there was a short recess, after which proceedings were resumed as follows:)

Trial Examiner Bokat: The hearing is now in session. May I state for the record, gentlemen, in the discussion we had in the chambers, the Respondent, after that discussion, or during that discussion, through its counsel, has indicated its willingness to produce other letters that Mr. Barr wrote to Mr. Powell concerning the meetings which took place on the 13th, 14th and 16th of December.

Mr. Ball: No, Mr. Barr wrote to Mr. Powell prior to December 16; and that Mr. Powell wrote to Mr. Barr reporting the meetings of November 12, November 25, December 13, 14 and 16.

Trial Examiner Bokat: That you are willing to produce that correspondence.

Mr. Ball: These are being produced.

Trial Examiner Bokat: I understand that they may be received in evidence without further identification .

Mr. Landye: That is correct.

Trial Examiner Bokat: Mr. Reporter, will you

(Testimony of John A. Barr.)

mark them in order and they will be received as Respondent's Exhibits 17 to 23, inclusive.

(Whereupon the documents hereinabove referred to were received in evidence as Respondent's Exhibits 17 to 23, inclusive.) [547]

RESPONDENT'S EXHIBIT No. 17

Air Mail

Chicago, Illinois

September 24, 1940

Mr. W. B. Powell

Law Department

Oakland, Cal.

Re: Warehousemen's Union—Portland

Mr. Estabrooks, representative of the Warehousemen's Union in Portland dropped in to see us yesterday on his way through Chicago. He is the representative of the Warehousemen's Union which has been certified by the Labor Board as bargaining representative for the warehousemen's group at the Portland house and store. We told Estabrooks that the Portland bargaining would be handled by Mr. Huddleston and you. Huddleston will contact you when called upon by the Union and arrange a time of meeting which is mutually convenient. I think that you should attend all meetings which are held with the Warehousemen's Union and you will probably carry the burden of the negotiations. I am sure that Huddleston will welcome your assistance.

(Testimony of John A. Barr.)

You will of course keep us advised of all developments and feel perfectly free to call upon us for suggestions on any point where the answer is not clear.

JOHN A. BARR

JAB/s

RESPONDENT'S EXHIBIT No. 18

Chicago

Nov. 22, 1940

Mr. W. B. Powell
Secretary's Office
Oakland, California

After discussing with Mr. Ball his letter to you of November 19 we thought it might be well to further clarify one or two of the points, particularly the subject of counterproposals.

To date, we have had no situation where we have sought a contract with a union. Therefore, by the very nature of the situation, the initiative lies with the union. We propose to fulfill our obligation to bargain with the unions in good faith, but this does not pass to us "the burden of going forward". The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our relative economic positions of such nature as to induce us to seek some concession from the

(Testimony of John A. Barr.)

union. That may happen at some time in the future but is not an immediate problem.

As Mr. Ball stated, we do not think that the Act places upon an employer the absolute duty to make counterproposals. This does not mean, however, that we are to take an abnormal or unnatural attitude with regard to counterproposals. We should explain our position on any point being bargained when requested to do so, and in many instances this will, in substance, include a counterproposal whether or not it is expressly so labeled. There is no objection to this procedure—it is a perfectly normal thing to do. In many instances a present practice, the *status quo*, may thus be offered as a counterproposal. Mr. Ball did not mean that counterproposals, in the broad sense, should never be made. He meant only that we should not take the initiative in the bargaining process.

To state it in different words, we do not want you to feel under abnormal restraint in the statement of the Company's position with respect to the points being bargained. This is necessary to good faith and we should not be unduly concerned over whether or not our statement of position contains what might be considered a counterproposal. Just keep in mind, however, that it is the union, not the Company, which is seeking an agreement.

The union may demand a closed shop. You will say "no" and give your reasons. No counterpro-

(Testimony of John A. Barr.)

posals is involved or called for. Again, the union may ask for 75¢ per hour for a certain job. If this is too high you will decline the demand and if the union asks for your reasons or for a counterproposal you would probably state that you have made a study of this wage and have arrived at the conclusion that 60¢ an hour is the proper wage. Whether we call this a counterproposal or not is not of primary importance.

This letter is probably unnecessary but I thought I might be able to add a mite of clarity to a subject which, at best, is not too clear. I will close with a "recapitulation" of some of the high points:

1. The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing.

2. The union is seeking something from us. We are not to assume the initiative by volunteering proposals or counterproposals.

3. In discussing individual clauses state that you have no present objection to clauses which are not objectionable, but do not "agree" to such clauses. You can only agree to a contract as a whole.

4. Insist on a "no-strike" clause without qualifications or exceptions.

5. Whenever in doubt as to what you should do resolve the doubt in favor of the Company. Err on the side of conservatism if you err at all.

6. Do not rush the bargaining process and do not yourself take the initiative in seeking an agreement.

(Testimony of John A. Barr.)

7. Bargain in good faith. State the Company's position on the points raised honestly and frankly. Your statement of position may or may not contain what might be considered as a counterproposal.

8. Whether or not any agreement reached will be reduced to writing and signed can only be determined after an agreement is reached. Prior to that time a discussion of this point is premature.

You're doing a good job, Bill. Keep it up. Keep us advised of what you are doing and contact us immediately if something gets "hot".

Good luck.

JOHN A. BARR

JAB/s

P. S. I am forwarding this to you as a privileged communication.

J. A. B.

I agree 100%.—S. B.

RESPONDENT'S EXHIBIT No. 19

Air Mail

Personal and Confidential

Portland, Nov. 13, 1940

Mr. J. A. Barr:
Law Department
Chicago, Ill.

Re: Warehousemen's Union—Portland

Yesterday Mr. Huddleston, Mr. Glassley and I met with representatives of the Warehousemen's

(Testimony of John A. Barr.)

Union in Mr. Huddleston's Office. The Union representatives were Mr. Estabrook and Mr. Holmes, representing the Warehousemen at Portland and Mr. Towers, representing the Warehousemen at Oakland. The discussion did not concern the Warehousemen at Oakland but we were told that Mr. Towers had come up from Oakland merely to sit in during the negotiations.

The agreement submitted by Estabrook was discussed, Section by Section, as follows. During this discussion the Union representatives made very few comments on our statement of the Company's position and it was apparent they were desirous of hearing the Company's position on all the provisions before presenting any argument.

Article 1. We stated that the first sentence of Article 1 was not a subject of agreement but contains a question of fact which neither the Union nor the Company is free to agree upon. When Estabrook stated it was very important to have some such statement in the agreement, we suggested that the statement might be placed in a preliminary "whereas" clause.

In regard to sentence 2 of Article 1 we stated that we were perfectly willing to let the Union decide for itself which employees should be eligible for Union membership.

Article 2. We stated we could not agree to this article for the reason that the policy of the Company is to allow the employees full freedom of

(Testimony of John A. Barr.)

choice in regard to joining a labor organization. We made it clear that the Company could not agree to influence its employees either directly or indirectly in this regard.

Article 3. Section 1—We explained that we could not agree to Section 1 as it is worded. We stated that we could agree to a provision somewhat like this: no employee shall work less than four hours per day; no female employee shall work more than eight hours per day; the work week shall consist of 40 hours of work from Friday to Thursday inclusive excluding Sunday. This statement conforms to our present policy although we did not make the statement that this was our present policy. Mr. Estabrook suggested that we pass over that point for the present.

Section 2—We explained that due to the service demanded by our customers some employees must start work at 5:30 A. M. and they will finish early whereas other employees will come in late in the morning and may work until after 6:00 P. M. Therefore we could not agree to Section 2. Also, we stated that overtime was figured on the weekly basis of 40 hours rather than upon a daily basis.

Section 3—We stated that we had no objection to Section 3 except that we would not pay overtime for Saturdays, Washington's Birthday or Armistice Day.

Article 4. We stated that we could not agree to the minimum wages set out in Article 4 for

(Testimony of John A. Barr.)

the reason that they were much too high and the Company is not in a position to pay such a high scale. Estabrook and Holmes then asked us what we felt the schedule of minimum wages should be. I replied that we had set up a list of minimum wage rates which we would be willing to agree to. Before the meeting Mr. Huddleston, Mr. Glassley and I had prepared the list for the classifications indicated in Article 4 and we had indicated the minimum rates as an hourly rate rather than a weekly rate. Also, we had indicated whether the particular job was plus bonus or without bonus. I read this list to Mr. Estabrook and he jotted down the figures on his copy of the proposed agreement.

Also, we objected to the words "for any cause" in the first sentence of the last paragraph. We explained that those words would have to be stricken out and the Union representatives agreed.

Article 5. We had no objection to this Article except to say that overtime was figured on a weekly basis rather than a daily basis, that is, we explained that a Mail Order employee might work 9 hours one day and 7 hours the next day and he would not receive overtime unless he worked more than 40 hours in that week.

Article 6. We stated we could not agree to Article 6 as written. We were pressed for a counter proposal on this point. As a matter of fact we do have working Supervisors in the Portland Plant and we stated we could agree that each working

(Testimony of John A. Barr.)

Supervisor should be paid at least 3¢ per hour more than any employee directly under his supervision.

Article 7. We had no objection to Article 7 providing the Union would agree to change the word "five" to "six" which is our present practice.

Article 8. Section 1—This provision is covered by law and is not a subject for agreement.

Sections 2 and 3—Our objection to both of these Sections was that the Company could not agree to vest the final decision as to the discharge of an employee or as to the physical condition of an employee in any third party. We explained that the Company desires that the ultimate decision as to whether or not an employee shall be discharged must remain with the Management. We took the same position in regard to the physician selected by the Company.

Article 9. Here we explained that the Company's decision in the matter of layoffs and re-hiring is determined by a consideration of many factors including seniority, efficiency, ability, adaptability, promotability, flexibility, age, sex and marital status. Therefore, we could not agree to the provisions in Article 9.

Article 10. We had no objection to this article providing it was understood that a vacation would not be granted until after a full one year of service.

Article 11. We stated we had no objection to the first and second sentences. We stated we could not agree with the third sentence as it appeared

(Testimony of John A. Barr.)

to abrogate the Union's obligation under sentence #1. Estabrook and Holmes declared that they would not in any event unconditionally agree not to strike. They stated they would not agree to give up that right entirely. They believe the third sentence is advisable because then they could not strike unless the strike was sanctioned by the Portland Central Labor Council. As we understand it, in order to have a strike sanctioned by the Portland Labor Council it is necessary for the Union to present their case to the Council showing that the members have voted for a strike and a date is set for a hearing at which time the employer may come in and state his case. After this hearing the Labor Council decides whether or not to sanction the strike.

Before the meeting Mr. Huddleston and I had decided that we could express our agreement with sentences Nos. 1 and 2 but that we would object to sentence No. 3. The conclusion we reached after the meeting was that unless we want to insist upon an unconditional agreement not to strike there will be no harm in agreeing to sentence No. 3. However, we did think it advisable to insert in sentence No. 3 after the words "by some union" the following phrase: "other than Warehousemen's Union, Local #206." Of course, we do not yet have the Union's reaction to this thought. Therefore, I would appreciate any additional comments you may have in regard to Article 11.

(Testimony of John A. Barr.)

Article 12. We had no objection to sentence No. 1. Also we had no objection to sentence No. 2 except that we could agree to that provision only for our full time regular people. We explained that our part time, regular people receive holiday pay on a prorata basis whereas temporary people are not paid for holidays. We had no objection to the third sentence of Article 12.

Article 13. Here we went into quite a bit of detail to express fully to the Union representatives our objections to a Board of Adjustment. In a word, our position was that the Company desired that the ultimate decision on matters affecting the operation of the business should remain in the Management. Estabrook stated they would be willing to withdraw Article 13 as they had received some adverse decisions from Adjustment Boards recently. In other words, he meant to convey that it would be to our advantage to have Article 13 in the agreement.

Article 14. Estabrook did not suggest a term for the agreement and I explained that if we could agree on the terms then we would submit the matter to our Chicago Office where the decision as to the term of the agreement would be made.

Mr. Estabrook and Mr. Holmes then stated that they would like to consider our position further and they were very sorry but they could not meet with us any time during the balance of this week. They stated that they had a strike on their hands in the

(Testimony of John A. Barr.)

grocery industry and they hoped to have it settled by the end of the week. Mr. Estabrook said he would telephone me in Oakland sometime next week and that he would be glad to come to Oakland for further discussion.

Also, Estabrook asked if we could, in the meantime, prepare a written statement of terms which would be agreeable to the Company. He expressed the belief that we were obligated to submit our position in writing. I answered that it would serve no purpose for us to submit written terms until he could assure us that those terms would be agreeable to the Union. Estabrook then said he did not know whether or not the terms would be agreeable. He said they would have to submit the terms to their membership to find out if the members would agree. He then repeated his request that we prepare an agreement in writing which will be agreeable to us. He said then they would have something to submit at the meeting of the Union members. I again replied that I did not see any point in our submitting a written proposal until he could assure us definitely that the terms would be agreeable. The meeting then broke up with nothing further being said on this point.

I would like to submit this for your consideration. Do you feel that our obligation to bargain in good faith requires that we submit the Company's position in writing? The question of reasonableness is involved here and I have not yet reached a con-

(Testimony of John A. Barr.)

clusion in my own mind. There is some argument to the effect that if we will state verbally the terms which are agreeable to us we should have no objection to reducing those terms to writing. This seems to be in line with the Court decisions which require that an employer is obligated to sign an agreement where he has reached a verbal agreement with a Union. On the other hand it seems that we are perfectly within our rights to say that there is no reason to submit our terms in writing until we reach a meeting of the minds by verbal discussion. It does seem useless to present our terms in writing when we are pretty sure they will not be accepted.

Another point to consider is the Union's statement that they want something in writing to submit to their membership and there is a question as to whether we are obligated to furnish a written statement of terms for that purpose.

As Estabrook will probably call me next week I will appreciate your comments as soon as possible. Will you please send a copy of your reply to Mr. Huddleston.

W. B. POWELL,
Law Department.

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 20

Airmail

Oakland, California

Personal & Confidential

November 26, 1940

Mr. John A. Barr

Law Department

Chicago, Illinois

Re: Labor Relations

This will confirm our telephone conversation of this morning. The meeting yesterday was held in Mr. Clerin's office at two p. m. The union representatives were Messrs. Estabrook and Holmes from Portland, Towers from Oakland, White, who is secretary-treasurer of the Western Warehouse Council San Francisco, Wood, Cohen (the latter two purporting to represent the retail clerks in Alameda County) and Nathan who is international representative of the retail clerks for Northern California. There were three other men who came into the meeting late and I did not get their names. The company representatives were Messrs. Clerin, Jenkins, Cook, Barr and myself.

The case for the union representatives was presented by Mr. White and his statements were just about the same as those contained in the newspaper which I sent you. He wound up his speech with an ultimatum that unless the company would agree to a union shop at Portland they were prepared to take joint action against the company in the eleven Western states. Mr. Estabrook then suggested he

(Testimony of John A. Barr.)

would be glad to fly to Chicago to talk with you, if there was some possibility that our policy could be changed. At first they insisted we give them a reply within twenty-four hours, but later agreed to allow us until noon on Thursday, November 28. I will wait until Thursday morning at which time I will call Mr. White in San Francisco and explain that you will be glad to meet with union representatives in Chicago and listen to their argument, but I will not assure him that any change in policy is contemplated. If White insists that I state whether or not a change in policy is contemplated, I will state that as far as I know no change is contemplated at the present time.

After I talked to you I called Mr. Huddleston and informed him of developments. Mr. Huddleston said he had received word that the Sears plant in Seattle has re-opened without an agreement for a closed shop having been signed.

The possibility of picketing presents this question. If picket lines are established before our people come to work, some employees, when they see the picket line, may think the plant is closed and they will hesitate to enter the plant. It seems to me that it would be proper for us to have a few selected employees standing on the sidewalk to answer that question, if it is asked by employees coming to work. In other words, the only function of those men standing on the sidewalk would be that if employees asked whether or not the plant

(Testimony of John A. Barr.)

was open the reply would be yes. This procedure might prevent employees congregating in groups around the picket line. If employees hesitate to enter the building and form groups on the sidewalk, it is possible a labor orator will jump on a soap box and say a few words on unionism. Of course, our representatives on the sidewalk will say nothing other than to answer the question as to whether the plant is open.

Also, if there is some labor trouble and newspaper reporters come in to see us, I am wondering if the company desires any statement to be made to the press? Of course, the text of any statement we might make would depend on what fact situation developed, but I am wondering if the company desires to refuse to make any statement whatsoever, or if we should make some brief statement as to just what situation exists?

Thank you for your letter of November 22.

W. B. POWELL,

W. D. P.

Law Department

WBP:RD

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 21

Portland, Dec. 13, 1940

Mr. John Barr
Law Department
Chicago.

Re: Labor Relations

The following is a report of the meeting held in Mr. Huddleston's office at 10:00 A.M. on Friday, December 13.

Present in behalf of the Company were Messrs. Huddleston, Barth, Denecke and Powell. Present in behalf of the Unions were the following:

Messrs. Lamber—Retail Clerks Union, Seattle,
Wash.

Jack Schlaht—Teamsters Union, Port-
land

James Landye—Attorney

Howard Hicks—Office Workers Union

Eugene Allen—Editor, Labor Press

Fred Dixon—Retail Clerks Union

Max Langford—Retail Clerks Union

Bill Lamberton—Retail Clerks Union

Bill Glazier—Warehousemen's Union,
Seattle

Jack Estabrook—Warehousemen's Union

Gust Anderson—Secretary, Central La-
bor Council

Phil Brady—President, Central Labor
Council

(Testimony of John A. Barr.)

Mark Holmes—Warehousemen's Union,
Portland

Also, Mr. Frank Ashe, Federal Conciliator attended the meeting.

The meeting was opened by a few remarks by Mr. Brady, stating that we were all here to find some solution to the present difficulty and that he would like to know what suggestion the Company had to make as a solution to the problem. I replied that I had no suggestion to offer and asked him if the Union representatives had decided on a plan or a proposal which they would suggest. Mr. Estabrook then stated the Unions were particularly concerned with the matter of recognition and he asked what the Company would be willing to do in that respect. We replied that in the case of the Union which he represents, the National Labor Relations Board had certified his Union as the sole collective bargaining agent and, therefore, we had no choice but to recognize the Warehousemen's Union as the sole collective bargaining agent for the unit defined in the Order of Certification. We explained that this was not a matter of agreement but was a question of fact which had been decided and we would recognize that fact.

Mr. Brady then asked how far we would go in recognition of that fact. I stated that the answer to his general question would depend on what proposals were submitted by the Union. We explained that wherever a Union represents a majority of

(Testimony of John A. Barr.)

our employees in an appropriate bargaining unit, we would recognize that Union as the sole collective bargaining agent.

Mr. Estabrook then asked if the Company would agree to the closed shop provision in the proposal he had previously submitted. We answered that the Company's policy had not changed in that respect and that we could not agree to a closed shop. He then asked if we could agree to a union shop and we answered that we could not. Some of the other union representatives suggested some modifications of the Union shop provision and in each case we replied that we could not agree.

Then Mr. Dixon asked if there was any question as to recognition of the Retail Clerks. I replied that we had accepted a letter from him with his statement that his organization represented a majority of the employees in our Retail Store and I asked him if his Union still claimed to represent a majority of the people. He replied that the Union did still claim to represent a majority. This is interesting because our Retail Store figures show that approximately 71% of the basic organization has been at work during the strike.

Mr. Glazier stated that Sears Roebuck & Co. in Seattle had signed a union shop contract to settle their recent strike and he thought we should do the same. However, I stated that the union shop provisions which had been submitted to us thus far were not acceptable as we could not agree to them.

Then Mr. Landye assumed the spokesmanship for

(Testimony of John A. Barr.)

the Union representatives and asked what counter-proposals the Company had to offer to the proposals which had been submitted. He asked if we had any counter-proposal to the provisions for Union shop. I replied that as the Company had a substantial objection to a Union shop provision I could not conceive of any counter-proposal the Company could make on that point. He then asked if the Union shop provision were omitted would the Company agree to the remainder of the proposal which had been submitted. I explained that the only proposal which had been discussed thoroughly was the proposal submitted by Mr. Estabrook in behalf of the Warehousemen's Union and pointed out that the proposal submitted by Mr. Dixon had not been discussed thoroughly because when Mr. Dixon found that we could not agree to the union shop clause he stated it would not be worth while to discuss the remaining clauses. The union shop provision was Section 2 so all the remaining sections were never discussed with Mr. Dixon.

Mr. Landye then asked if we would agree to the proposal submitted by Mr. Estabrook if the union shop clause were omitted. I stated that the Company could not agree to the remainder of the proposal as the Company had substantial objections to certain provisions. Landye then stated that since the Union had submitted to us a proposal which was not acceptable, it was our duty to submit to the Union a proposal which would be acceptable to us. I replied

(Testimony of John A. Barr.)

that in our negotiations thus far the Unions had submitted proposals to us and that we had no proposals to submit or any demands to make upon the Union. I did state, however, that our proposal or demand at present was that the picket lines be removed and the employees be allowed to return to work. I added that the Company had no other proposal to submit nor did the Company intend to make any other demands on the Union.

Landye then insisted that we submit some counter-proposal in writing. I replied that if the Unions desired they could consider our statement of the Company's position as counter-proposal for each provision. I added that it was my feeling that since the Union had submitted a proposal negotiations could be best handled by oral conversation which is flexible and that I saw no purpose to be served by submitting the statement of the Company's position in writing. Both Landye and Glazier asked that we prepare a written counter-proposal and submit it to the Unions by 10:00 o'clock the next morning. We answered that we had stated the Company's position frankly in regard to each one of the Union's proposals and that we had nothing further to submit. Landye stated it was common practice among employers to submit a counter-proposal even before negotiations were entered into and he thought we should adopt that practice. Landye asked us if we were willing to write a counter-proposal and I answered that I didn't feel it was necessary in view

(Testimony of John A. Barr.)

of our oral statement of the Company's position. We made it clear that the Company was not making any demands upon the Union and Landye replied that the Company never would make demands on the Union. Then he said "Will the Company give three counter-proposals of your ideas as to what a Union agreement should be?" He added that we should incorporate our ideas as to hours and wages in our complete counter-proposal. We stated again that if we were making demands upon the Union we would probably submit a proposal to them but that as we are not making demands upon them it would not be necessary to submit a proposal in writing.

Landye then asked the direct question "Will you submit a counter-proposal in writing?" to which I replied "No". Landye then said "That's all I wanted to know," and rose from his chair and prepared to leave.

Also, Mr. Holmes asked if we would submit to him a statement of the Company's position, in writing, for the agreement submitted by Estabrook and I replied that I thought no purpose would be served by so doing.

The Union representatives broke off negotiations and Glazier, Schlaht, Estabrook, Allen, Lamberton and Landye got up and walked out of the meeting in a huff. The other Union representatives stayed behind and shook hands with us before they left. The following remarks were made by the Union

(Testimony of John A. Barr.)

representatives as they left—Mr. Glazier stated “I’m going back to Washington and put the whole state on the Unfair list”. Jack Schlaht left the meeting with the remark “I guess they want more fight.”

As soon as the Union representatives had left Mr. Ashe asked if he could have a word with Messrs. Barth, Huddleston, Denecke and Powell. Mr. Ashe wanted to know if there wasn’t some proposal we could submit on the matter of recognition. We explained again that we did not consider the matter of recognition a matter for agreement but that if such a clause had any place in an agreement it should be in a preliminary “whereas” clause rather than a part of an article of agreement. Mr. Ashe then started reading from a long list of various types of union shop clauses and asked if any of those would be acceptable. I asked if he had an extra copy of that list and he replied he thought he could get one. Mr. Huddleston offered to have copies made so three copies were typed up and the original returned to Mr. Ashe.

Mr. Ashe stated that there was no legal obligation on the part of the Company to enter into a written agreement on the matter of recognition in view of the Wagner Act. Also Mr. Ashe said he had checked into the question of grievances and he had satisfied himself that no grievances had been reported.

The meeting broke up about 11:30 and Mr. Ashe left about 12:15 P.M.

(Testimony of John A. Barr.)

At 1:30 P.M. Mr. Ashe called back and suggested another meeting at 10:00 o'clock Saturday morning in Mr. Huddleston's office. I replied that we had nothing further to submit but that if he felt a further meeting was advisable we would be glad to meet. We stated that we were anxious to cooperate with him and asked for his judgment as to the desirability of another meeting. He replied that he wanted to have another meeting before he reported to Washington so that he could be sure in his own mind that negotiations were absolutely deadlocked. We agreed to meet at 10:00 o'clock Saturday morning.

W. B. POWELL

RESPONDENT'S EXHIBIT No. 22

Portland, Dec. 14, 1940

Mr. John Barr:
Legal Department
Chicago, Ill.

Re: Labor Relations

This is a report of the meeting in Mr. Huddleston's office on Saturday, December 14 at 10:00 A.M.

Present on behalf of the Company were Messrs. Huddleston, Barth, Glassley, Denecke and Powell. Mr. Ashe, Federal Conciliator, attended the meeting. Present on behalf of the Unions were Messrs. Hicks, Allen, Estabrook, Dixon and Langford, whose titles are mentioned in my letter of Decem-

(Testimony of John A. Barr.)

ber 13 to you. I asked Mr. Allen what group he represented and he stated he was President of the Office Employee's Union.

Mr. Ashe opened the meeting with the question as to whether the Company had anything at all in the way of a proposal to submit which might provide a basis for an agreement. I answered that the Company had nothing further to submit at this time other than our statement of the Company's position in regard to each one of the proposals which had been submitted to us thus far. Also, I added that the Company did have a demand to make upon the Union and that demand was that the picket line be removed and the employees allowed to return to work.

I stated that yesterday we had replied "No" to the question "Will you submit a counter-proposal in writing?" I added that the answer was still—No—but that we would like to elaborate on that point. I stated that by answering "No" we did not mean to imply that the Company has a policy against counter-proposals and that I did not mean the Company would never submit a counter-proposal. However, we felt that we had nothing further to submit at this time other than the statement of the Company's position which they could consider as counter-proposals if they chose.

I stated there might be situations in which a further proposal on the part of the Company would be desirable and that if Montgomery Ward was running a sweat shop, paying very low wages for

(Testimony of John A. Barr.)

a high number of hours each week, the Company might feel it advisable to make some counter-proposal. But, I said, we do not feel that the Company is running a sweat shop and that I thought the Union representatives would agree with that statement. None of the Union representatives made any comment or reply to that statement.

Mr. Estabrook asked if we would be willing to accept the agreement which Sears Roebuck in Seattle had entered into. I replied that I did not know what that agreement contained but from the statements of Mr. Glazier I understood the agreement contained a provision for a Union shop and, I added, if such was the case this Company could not agree. No one in the room knew what was in the Seattle agreement so that subject was dropped. Allen then asked if the Company would be willing to sign an agreement which merely sets out the present policies and practices. I replied that the question of the form of agreement, that is, whether it should be verbal or written, is premature at this time. I suggested that if we could reach an agreement upon substantial provisions, then that question should be considered. Allen then stated that if we could reach agreement would we be willing to sign it. I replied that possibly we would but that I thought a discussion of that question was premature.

Messrs. Estabrook and Dixon brought up the matter of wages and claimed we were not paying the prevailing scale. We disagreed on this point and

(Testimony of John A. Barr.)

stated that we felt the Company is paying wages equal to or better than wages paid by other local employers for comparable jobs.

Mr. Ashe then suggested that we take one of the proposals and go through it section by section so all of us would understand just what the Company's position is on each point. I answered that if he thought such procedure was advisable we would cooperate but that the Company's position had not changed since we had gone over the provisions of the proposal submitted by Mr. Estabrook. Mr. Estabrook stated his recollection was we had objected to every clause in the proposal although he later remarked he did remember that we had made no objection to some of the provisions.

Mr. Ashe thought it would be a good idea to get a statement of the Company's position in writing so he would know just where we stand. I replied it seemed to me the purpose of negotiations were best served by oral conversation which is flexible. Mr. Ashe suggested and later insisted that we have a stenographer in the meeting to take down verbatim everything that was said. We stated such procedure would destroy the flexibility of negotiations and we did not feel it was necessary. Mr. Ashe said he would be willing to bring his own stenographer so that he himself would have a record of just what the Company's position is. I called to his attention the fact that he had attended our meeting of last Saturday in the City Hall at

(Testimony of John A. Barr.)

Oakland, at which meeting we had stated the Company's position on the provisions of the Union proposal. Mr. Ashe replied that he did not remember just what was said at that meeting and he felt sure the Union representatives did not understand just what the Company's position is. I stated we did not feel the presence of a stenographer would facilitate the discussion and that we would object to such procedure. However, I added later that I would find out if it was the Company's desire that stenographic notes be taken and I would call him later in the day.

Mr. Estabrook mentioned that he would not insist that the Union have a copy of the stenographic notes and that he wasn't interested in having a copy for the Union. Estabrook indicated that the Union representatives would be willing to come to the meeting without a stenographer and merely make pencilled notes.

The meeting adjourned with the understanding that we would meet again at 10:00 A. M. Monday and the question as to whether we would have a stenographer present was left undecided.

W. B. POWELL.

W. B. Powell

(Testimony of John A. Barr.)

RESPONDENT'S EXHIBIT No. 23

Portland, Dec. 17, 1940.

Mr. John A. Barr
Law Department
Chicago.

Re: Labor Relations.

The following is a report of a meeting held in Mr. Huddleston's office at 10:00 A. M. Monday, December 16. Present in behalf of the Company were Messrs. Huddleston, Barth, Denecke and Powell. Mr. Ashe, Federal Conciliator, attended the meeting. Present in behalf of the Unions were Messrs. Dixon, Hicks, Allen, Estabrook, Holmes and Langford.

The meeting opened with a request by Mr. Estabrook that we go over the Warehousemen's proposal section by section. I mentioned that we had gone over the the proposal before and we would like to know if there were some provisions of the proposal which the Union felt were essential and should be discussed first. Mr. Estabrook stated he felt the provision for Union shop was essential. I repeated our objection to a Union shop provision and asked if Estabrook was willing to withdraw the Union's demands in that respect. He stated they were not willing to withdraw their demand for a Union shop. We then stated that we wondered whether it would be advisable to discuss the remaining provisions snice we were deadlocked on the question of Union shop. Also,

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

we pointed out that we have substantial objections to the seniority clause and to an arbitration clause. We explained that the Company does not recognize seniority in the sense that the Union uses that word. We made the further statement that unless the Unions were prepared to withdraw their demands in regard to Union shop, seniority and arbitration, that we questioned the value of a discussion of the remaining provisions.

Mr. Ashe said he thought that point was well taken and he turned to the Union representatives for their reply. The first reply by Estabrook was that his Union would not withdraw its demand for a Union shop but after a discussion with the other Union representatives, the Unions took the position that the question as to the withdrawal of their demands would have to be submitted to the union membership and they stated that they did not have authority to withdraw the demands. We then asked the Union representatives if there was a possibility that their demands for Union shop would be withdrawn and Mr. Estabrook said there was a possibility.

With that understanding we proceeded to a discussion of the Warehousemen's proposal, section by section.

Article 1. We stated that the first sentence of Article 1 is a question of fact and not a subject for agreement. We pointed out that if such a statement has any place in the agreement it should

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

be in a preliminary "whereas" clause. The Union representatives attempted to reword the first sentence of Article 1 and we suggested that possibly the language of the Order of Certification by the National Labor Relations Board would express the fact accurately. Mr. Ashe suggested a wording somewhat as follows—"whereas the Warehousemen's Union #206 as certified by the National Labor Relations Board as the proper collective bargaining agency for a certain unit and the Company recognize such Union as the designated bargaining agent . . ." He asked if we had any objections to that statement and we said we thought that would be all right. We felt the second sentence of Article 1 is not a subject for agreement and should be left to the uni-lateral decision of the Union.

Article 2. We presented our objection to a Union shop and again asked if the Warehousemen's Union was prepared to withdraw this demand. Estabrook said they were not, but said the Union membership might vote to withdraw it at some later date.

Article 3. Section 1. We stated that the first sentence of this section was alright as regard to female employees. However, it was objectionable as applied to Male employees. As to the second sentence we stated that the week should run from Friday through Thursday and if so worded it would be agreeable to us. We stated that Section 2, first

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

sentence, was open to the same objection as sentence 1 of Section 1 when applied to Male employees. Also, the 8:00 A. M. to 6:00 P. M. phrase was objectionable as it was necessary, to give our customers the service they demanded, to have some people come to work at 5:15 A. M. Also, on occasions, we desired our people to work after 6:00 o'clock without being obligated to pay time and a half. As to the second sentence of this Section, we explained that we pay overtime on a weekly basis rather than a daily basis. On this particular section, as well as throughout the meeting, the Union usually noted our objections and passed on without any argument.

On Section 3 of Article 3 we stated we had no objection to this Section if Saturdays, Washington's Birthday and Armistice Day were eliminated. We also objected to the inclusion of Sunday, stating that we usually paid time and a half for Sunday work but only because such work nearly always was over the 40 hour quota of the people involved but we did not believe it possible to agree to pay overtime for all Sunday work.

As to the wage provisions in Article 4, we stated that we were unable to make any concessions in the matter of wages. We also stated that the Company was at present considering a new plan of classification of wages. Some one of the Union representatives asked if the proposed plan included the elimination of the bonus system and the paying

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

of a wage based upon the average six months earnings. We stated that we believed the elimination of the bonus system was a possibility under the new plan but the details of the plan had not as yet been worked out.

As to the last paragraph of Article 4, we objected to the phrase "for any cause" and suggested in its place a clause meaning that no reduction should be made because of the operation of this agreement. As to the last sentence of this paragraph, we objected because it provided for a Board of Adjustment. Estabrook and Dixon stated they were willing to eliminate the Board of Adjustment as they believed it was more favorable to the employer than to the employee. However, Mr. Holmes spent some time in arguing the desirability of an Adjustment Board. Mr. Ashe tried to tell us that we had to accept the Board of Adjustment because of the Wagner Act. However, on further discussion he admitted that he believed the Board of Adjustment referred to in this agreement was similar to a Grievance Committee. Estabrook clarified him on this point.

Article 5 was unobjectionable if the second sentence were interpreted in the light of our suggestion for Section 2, Article 3, that is, figuring overtime on a weekly rather than a daily basis.

We objected to Article 6 on the ground we did not believe we employed persons such as those mentioned. Also, we inquired whether the second

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

sentence of Article 1 did not eliminate such persons from the jurisdiction of the Union. Also, we stated we could not grant any concessions in the rate of pay of these people.

We stated we had no objection to Article 7 if the five were changed to six.

We objected to Section 1 of Article 8 and a long discussion ensued. Ashe agreed we were bound as a matter of law to observe the policy set out in this Section and stated he saw no reason for us objecting to its inclusion in an agreement unless we merely did not want to give the Union the satisfaction of having it there. He also read to us similar clauses in other agreements and asked us if we would change these other agreements in other industries. We stated it was up to those people as to what they desired to put in their agreements. Then the Union representatives and Ashe argued that such a clause should be included because a lot of the Union members did not know of a similar provision in the Wagner Act. Finally the Union agreed to pass to the next clause.

We objected to Section 2 of Article 8 because it involved the Board of Adjustment and stated that it was the philosophy of the Company that in order to run the business properly the ultimate decisions in these matters must fall to the Company Management and not to any third party. Our objection to Section 3 was based upon the same theory.

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

We objected to all of Article 9 because it involved the seniority rule.

We had no objection to Article 10 if it was understood that there was no right to a vacation until the person had been employed one year.

The first two sentences of Article 11 were unobjectionable to us. We objected to the third sentence on the ground that it seemed contrary to the duty assumed by the Union in the first sentence. We asked whether the Union was willing to insert after "some union . . ." the phrase "other than Warehousemen's Union, Local #206". Holmes stated they objected to such insertion. Holmes also stated that while the Warehousemen's local was a member of the Central Labor Council, it was not always necessary that the Central Labor Council sanction every strike by one of its members. When asked whether or not the present strike was sanctioned by the Central Labor Council before it began, Holmes replied that it was.

The first sentence of Article 12 was not objected to by us. The second sentence was unobjectionable as to full time employees. We explained that pay for holidays for part time employees was prorated. The last sentence was unobjectionable except as our objections to Section 3 of Article 3.

We objected to Article 13, reiterating our past objections to Boards of Adjustments.

This finished our discussion of the Warehousemen's agreement. Estabrook asked how employees

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

now out would be taken back on the payroll. We explained they would be taken back without discrimination because of the fact that they were out. We also informed them that soon we would be making the Christmas lay off and there would not be jobs available for some of them. We then had a brief discussion of Union activity in the plant on Company time. Holmes was willing to forego Union activity on Company time and property.

We then turned to the Office Worker's agreement. Dixon and Hicks stated they would be willing to submit one proposal covering the whole Retail Store as agreed in their letter. They stated that the Office Worker's proposal before us was to cover only Office Workers in the Mail Order House. Hicks, when asked whether he claimed a majority of such people, said "Yes" he did, that he had at least 70% and when asked, stated he would send a letter to us to that effect. We did not state whether or not we would accept the letter. He also stated he was willing to take any reasonable means to convince us he had such a majority.

In discussing the Office Worker's agreement we only took up those clauses which were not dealt with in the Warehousemen's agreement and also, as requested by the Union representatives, we told them which clauses in this agreement we had no objection to.

As to Article 1, we stated that here argument over the question as to who was to be in the juris-

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

diction of the Union was not a subject for agreement but rather something for the uni-lateral decision of the Union.

Article 5 was unobjectionable except that the second sentence would be open to our repeated objection as to which days should be designated as Holidays and also it would apply only to full time employees.

Article 6 was alright if it were agreed that the Section applied no decrease would be made because of the operation of this agreement.

Article 7 would be agreeable if the "five" were changed to "six" days and the "40th hour" changed to the "45th hour". Also, the 8 hour day was acceptable only so far as female employees are concerned. We passed on from this clause without discussing the remaining sentences.

We objected to Article 9 on the ground that basically it was an application of the seniority rule.

We objected to Article 10 on the ground that we have no apprentice classification and we were not willing to agree to such provision, no matter what such classification was called.

Article 12 was alright. Article 14 was given a very novel interpretation by Mr. Dixon. Mr. Dixon stated that as we all knew the birth rate in this country was on the decline and that anything which could be done to preserve the sacredness of motherhood would be a great achievement and that this clause was intended for the benefit of the female

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

employees. We stated that this was a novel clause to us and we would like to think it over. Also, we gave a brief explanation of the W. E. B. P.

We had no objection to Article 15 if the "15" were changed to "10" and stated that at the present time although our rule was ten minute rest periods we did not check the time closely and did not penalize occasional rests over ten minutes.

As to Article 16 we asked if this substantially is the same as the provision contained in the National Draft Act. Hicks stated he believed it was but did not know whether such provision applied to women. Holmes and Hicks stated that in both their agreements they would be willing to incorporate the language of the Draft Act. We stated that we certainly intended to observe in substance the policy outlined in this Section.

We then briefly discussed Article 11 and while we made no concrete objection to it we did not agree to it. It was stated by Hicks that a 5% change in the cost of living had not occurred in at least a year and a half in Portland. We also pointed out that the clause seemed a little one-sided because of the last sentence.

We then discussed the wage scale in Dixon's proposed agreement for the Retail Clerks and told him we could make no concession in this regard. At this point in the discussion we asked whether they considered this concern a sweat shop. They said it wasn't as bad as some concerns but they

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

definitely believed substandard conditions existed, especially in the matter of wages. Dixon stated that the scale provided for in this agreement is observed by all the "Specialty" shops down town but admitted it was not followed by the Department Stores.

He then stated very directly that he too could make no concessions in minimum wages because of the Charter in his Union. The minimum wages set in his contracts with the Specialty shops could not be lowered in any other agreement.

This finished the discussion of the agreements. Ashe stated that the papers had been after him for statements as to the issues in this dispute and he stated to us what he intended to tell them and asked our opinion. In his opinion the issues were some form of Union shop, wage increases, some sort of an Arbitration Board and Seniority. Then we stated that was substantially correct, however, we believed that seniority should be interpreted. Ashe stated he felt seniority should be interpreted as it was in the railroad agreement, namely that length of service was the only consideration in the laying off and rehiring. At first the Union agreed with this. Then, however, Estabrook stated that they meant seniority to be only a fact in laying off and rehiring and that merit and ability could also be considered. He admitted this was not the intent of the various clauses in the agreements but stated that they were willing to consider some such clause

(Testimony of John A. Barr.)

(Respondent's Exhibit No. 23 continued)

in considering merit and ability along with seniority. We stated there were other factors beside these three. Then Estabrook stated that after we got through adding all of these other factors seniority didn't mean anything. Ashe agreed to omit Seniority as one of the issues.

The meeting disbanded with no plans for a future meeting. In the afternoon Ashe called, stating that he had been requested by Washington to get us together for at least one more meeting and we stated that if he believed that advisable we would do so, so a meeting was scheduled in Oakland at 10:00 A. M. on Wednesday, December 18.

W. B. POWELL,
A. H. DENECKE.
A. H. D.

Redirect Examination

Q. (Mr. Ball) Mr. Barr, in connection with the two advertisements run in the Portland papers, which you stated you drafted, Respondent's Exhibits 11 and 12, did you at the time of drafting them believe those statements to be true and correct?

A. I did, sir, and I still believe they are true and correct.

Q. In the course of the responsibilities which you have outlined, have you ever known of any instance where wage demands have been made and

(Testimony of John A. Barr.)

met by those charged with the responsibility of conducting the negotiations in connection with the company's policy which you have outlined?

A. Yes, on several occasions.

Mr. Ball: I think that is all.

Trial Examiner Bokart: Any recross, Mr. Landye?

Mr. Landye: No.

Trial Examiner Bokart: Mr. Walker?

Mr. Walker: No.

Trial Examiner Bokart: The witness is excused.

(Witness excused)

Trial Examiner Bokart: I understand that Mr. Walker has one witness, a Mr. Fullerton, which he would like to put on the stand at this time.

Mr. Ball: I understood that that witness was to be called tomorrow, and I have excused Mr. McGowan. Other than that, I would have no objection to the calling of Mr. Fullerton. [548]

There is always the question of confrontation by the party who is charged. Other than that, I would have no objection.

Mr. Walker: Mr. Fullerton has a job and is now working, and that is the reason it would be difficult to have him here tomorrow.

Mr. Ball: He was here the first day or two of the hearing, was he not?

Mr. Walker: I think that is correct, but he has now a job and is working.

Mr. Ball: Under those conditions, I certainly would not object, although there is the question of confrontation. I will waive any objection to his testimony being taken now.

Trial Examiner Bokar: We are now on the Board's case again, the previous witness having been taken on out of order.

ROBERT FULLERTON

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokar: Give your name and address to the reporter.

The Witness: Robert Fullerton. 7325 North Williams.

Trial Examiner Bokar: How do you spell your name, Mr. Fullerton?

Mr. Fullerton: F-u-l-l-e-r-t-o-n (spelling).

Direct Examination [549]

Q. (Mr. Walker) Have you ever been employed by Montgomery Ward? A. Yes, sir.

Q. When?

A. Since May of 1935 until this last December.

Q. Until December 7, 1940? A. Yes.

Q. During the time that you were employed there, what was your position?

A. I was stock man in Divisions 68 and 85.

Q. Who was your supervisor?

(Testimony of Robert Fullerton.)

A. Mr. W. A. McGowan.

Q. Following December 7, did you have occasion to meet with Mr. McGowan?

A. Yes. I did.

Q. Where? A. At my own home.

Q. How long after December 7 was that?

A. Well, I would say it was about the middle of the week.

Q. Following December 7?

A. Following December 7.

Q. What time did he come to your house?

A. Between 10:00 and 10:30.

Q. Prior to that time had Mr. McGowan been to your house?

A. He had never been there before, nor has he been there [550] since.

Q. Did you have a conversation with him at that time? A. Yes.

Q. What was it? A. Well, he just,—

Mr. Ball: Just a minute. I will object to this conversation. It certainly has not been shown that any conversation between these individuals would be binding upon the respondent; furthermore, any conversation between these individuals would be incompetent, irrelevant and immaterial, and would not tend to prove or disprove any issues in this case.

Trial Examiner Bokat: Overruled. You may answer the question.

Q. (Mr. Walker, continuing) Just go ahead and tell us, Mr. Fullerton, what was said by Mr. McGowan and what you said to him.

(Testimony of Robert Fullerton.)

A. Along about ten o'clock or 10:30, he came along and knocked on the door, and he was fluttering this way (indicating).

Mr. Ball: I move to strike that remark.

Trial Examiner Bokat: Yes, it may be stricken. I am sorry the record did not get the motion of the hands, indicating "fluttering". Just go ahead and state what was done or said.

A. (Witness continuing) He came to the door and knocked, and I came to the door, and he asked if he was welcome, and I said "Yes, come in." Then he said, "My wife is out here, can she come in, too?" I said, "All right." And he goes lugging along getting his wife, and he comes in with a couple quarts of beer, [551] and we proceeded,---

Mr. Ball: I move to strike that part of the answer involving descriptions by the witness, and ask that he be instructed to state the facts.

Trial Examiner Bokat: Well, I assume that is the witness' method of description in explaining what took place. You say that Mrs. McGowan came in?

The Witness: Yes.

Trial Examiner Bokat: He brought her in?

The Witness: Yes, he brought her in.

Q. (Mr. Walker, continuing) From that point on, what was said by Mr. McGowan and what did you say?

A. Well, he said that he was just making a friendly call, coming around, and then we talked

(Testimony of Robert Fullerton.)

about a few more or less inconsequential things, and then he said he was doing that with all of the fellows that he felt he could trust.

Mr. Ball: I have a standing objection?

Trial Examiner Bokat: Yes. The record will show that you have a standing objection.

A. (Witness continuing) So he said that he was coming around to each and every one that he figured he could trust, that was working on the floor, in order to get them back to work, and to tell them that if they were not there by a certain date, they would have to have their jobs refilled.

Trial Examiner Bokat: Were you on strike during this [552] time?

The Witness: Well, I didn't go through the picket line.

Trial Examiner Bokat: It has been testified that the strike started December 7?

The Witness: Yes.

Trial Examiner Bokat: Did you return that week?

The Witness: I did not.

Trial Examiner Bokat: Were you working the day that Mr. McGowan came to your house?

The Witness: No.

Trial Examiner Bokat: Proceed.

Q. (Mr. Walker, continuing) When Mr. McGowan said that your places, or the places of those would be filled who did not return to work, did you say anything to that?

(Testimony of Robert Fullerton.)

A. Sure. I said I was not going back to work as long as the picket line was there.

Q. Will you repeat that, please?

A. I said I wouldn't go back to work as long as the picket line was around the store.

Q. Did Mr. McGowan say anything after that?

A. No, he didn't say anything along that line, because he had been my employer long enough to know that when I made up my mind to do something, he wouldn't put up any argument for to,——

Q. Was anything said by Mr. McGowan about the union during that conversation? [553]

A. Well, he said that Montgomery Ward would never go union, that if it did, they would lock the door.

Q. Now, about how long did that conversation with Mr. McGowan last?

A. Oh, he was there, maybe, about three-quarters of an hour, I imagine.

Trial Examiner Bokar: Did you say he was there about three-quarters of an hour?

The Witness: Maybe about three-quarters of an hour; three-quarters to an hour.

Q. (Mr. Walker, continuing) Have you related everything that you can recall that was said at that conversation?

A. Well, I told him as long as there was a picket line around there, I wouldn't go to work. I told him I didn't have any other job, but that I would find one, and then he said that if I wanted a recommen-

(Testimony of Robert Fullerton.)

dation, for to let him know, that he would give me a verbal recommendation over the telephone, but he wouldn't put it down in writing.

Q. How did Mr. McGowan happen to make that comment?

A. We were just talking about it.

Q. How did that meeting with Mr. McGowan end? A. How did it end?

Q. How did that meeting with Mr. McGowan end?

A. He just said there wasn't any use for him to stay any longer, so he went home. [554]

Q. Did he say anything before he left? Did he say anything to you?

A. Well, he invited us out to his open house for New Year's.

Mr. Walker: That is all.

Cross Examination

Q. (Mr. Ball) Did you have some conversation at that time, that evening, about casting^{*} flies for bait?

A. Oh, my wife was working where they make them, and I showed him some that she made.

Q. You had a rather friendly discussion about that? A. Yes.

Q. You had told Mr. McGowan about this before, had you not? A. No, I had not.

Mr. Ball: That is all.

Trial Examiner Bokat: The witness is excused.

(Witness excused)

Trial Examiner Bokat: Are there any further witnesses on the part of the Board, Mr. Walker?

Mr. Walker: I have no further witnesses, Mr. Examiner. At this time, I move to amend the complaint by interlineation, inserting in paragraph 7, on page 3 thereof, the last line, the words "handling or" between the word "in" and the word "selling".

Trial Examiner Bokat: How would that read, now?

Mr. Walker: "In handling or selling".

Trial Examiner Bokat: May I suggest to Board's counsel that [555] the motion to amend the complaint with regard to the appropriateness of the unit as contended for by the union and as testified to by Mr. Dixon would not cover, it seems to me, that phrase. That is, it wouldn't cover the phrase which you have just used in moving to amend the complaint. I just thought, if you so desired, you might think it over and come in tomorrow morning with a more specific unit contended for by the union.

Mr. Walker: That will be all right. Then, with the exception of that matter, and the matter of producing the compilation of the Clerks' representation in the unit, I rest.

Trial Examiner Bokat: You rest?

Mr. Walker: Yes.

Trial Examiner Bokat: The Board rests, with that exception?

Mr. Walker: Yes.

Trial Examiner Bokat: I am not going to rule on your motion to amend. I will consider it withdrawn.

Mr. Ball: I was just going to say, that I am going to defer the making of a motion to dismiss the complaint until after the conclusion of the testimony; without waiving any rights, of course.

Trial Examiner Bokart: That is perfectly all right. I will at this time recess the hearing until 9:30 tomorrow morning.

(At 10:05 p.m. April 16, 1941, hearing adjourned to 9:30 a.m. April 17, 1941, same place.) [556]

Trial Examiner Bokart: The hearing will come to order.

Mr. Ball: It is stipulated by and between the parties that the Respondent has furnished a list of all employees in its retail store on its payroll on December 5, 1940, and that the number of employees on the payroll of the respondent's retail store at Portland subsequent to November 1st at no time exceeded the number on this payroll, and that this payroll may be introduced in evidence as Board's Exhibit 13. The number of employees on this payroll, Board's Exhibit 13, is 418, and includes the manager and all supervisory employees, these parties being so identified on the exhibit.

The Witness Dixon would testify that of the 418 employees designated on Board's Exhibit 13, 217 were eligible for membership in the Retail Clerks' Union, and are those classifications of employees who

fall within the unit which the Retail Clerks' Union claims to be appropriate in this proceeding.

That up to and including December 6, 1940, the Retail Clerks' Union had received signed applications for membership from 142 of these 217 employees, and subsequent to December 7, received signed applications from 46 of the said 217 employees. That the Retail Clerks' Union has, in addition to these 142, signed applications from 44 employees who are not listed on the payroll Board's Exhibit 13, whose applications were received prior to that date. [561]

It is further stipulated by and between the parties, that these are employees who had been on the payroll of Montgomery Ward at some time subsequent to May, 1940 and prior to December 5, 1940.

It is stipulated that the witness Dixon would testify that at all times subsequent to August 6, 1940, the Retail Clerks' Union has had signed applications from a majority of those employees of the Retail Store of the Respondent at Portland which fall within the classifications of the 217 employees listed on Board's Exhibit 13, which the witness Dixon claims would be eligible for membership in the Retail Clerks' Union.

It is stipulated and agreed that of the 142 employees who had applied for membership in the Retail Clerks' Union prior to December 7, 7 have not at any time gone on strike.

And it is further agreed that the applications mentioned above, received by the Union subsequent to December 5, represent employees who had not

designated the Union prior to December 5, but who did go on strike and did make such designation after that date.

Trial Examiner Bokat: Is it so stipulated?

Mr. Ball: It is so stipulated.

Trial Examiner Bokat: Is it so stipulated, Mr. Walker?

Mr. Walker: Yes. [562]

Trial Examiner Bokat: I would like to have the record show clearly the purpose of the stipulation.

This has been done, as I understand it, in the spirit of cooperation, to save time. Mr. Dixon, a representative of the Retail Clerks' Union, has produced in the hearing room, all of the signed designations and applications for membership in the Retail Clerks' Union; is that correct, Mr. Dixon?

Mr. Dixon: That is correct.

Trial Examiner Bokat: That you have all here, and they are available to check by any of the parties who desire to look at them; is that correct?

Mr. Dixon: That is correct.

Trial Examiner Bokat: You have already checked the designations as against the payroll of December 5, 1940, supplied by the respondent to the Board.

Mr. Dixon: On that payroll, yes, but I think it needs some explanation.

Trial Examiner Bokat: Does the payroll show that you represent the majority that you contend for at all times since August 6, 1940? Off the record.

(Discussion off the record)

Trial Examiner Bokat: The answer to that question is "yes"?

Mr. Dixon: Yes.

Mr. Ball: The Respondent is not questioning the fact that the applications produced in court by Mr. Dixon were really [563] received by the Union and represent the parties whose names appear on the applications.

Trial Examiner Bokat: As I understand it, Mr. Ball, your objection goes to the appropriateness of the unit, and not as to the fact as to whether or not the union has a majority in the unit they claim?

Mr. Ball: Our position is that we do not know, and it has not been proven that the union spoke for a majority of the employees in the appropriate unit.

Trial Examiner Bokat: All right.

Mr. Ball: Comes now the Respondent and moves to strike out the answer of the witness Estabrook reading "One of the most important reasons is that the membership got tired of Montgomery Ward stalling us around", which appears on page 143 of the record, on the ground that it states a conclusion and opinion of the witness, and does not establish any facts which have any probative effect, and doesn't tend to prove or disprove any issues in this case, and relates to a state of mind.

Mr. Walker: May I be heard on that?

Trial Examiner Bokat: Of course, you are lifting the sentence out of the context, with which I am not familiar.

Mr. Ball: I am perfectly willing to let the Exam-

iner defer his ruling, so long as the Examiner rules before the Board has rested its case.

Trial Examiner Bokat: Doesn't the record show that you have made an objection to that particular question? [564]

Mr. Ball: I don't know whether it shows at that particular point or not. It is not so indicated on the record that I made any specific objection to that answer.

Trial Examiner Bokat: Inasmuch as the answer to which the motion is directed appears to be one of the reasons why the membership of the Warehousemen's Union struck the plant of the respondent, I will deny the motion.

Mr. Ball: I think that is all I have at this point.

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Mr. Walker: With exception of the motion to amend paragraph 7 of the complaint, the Board rests.

Mr. Ball: At this time, the Respondent asks leave of the Examiner to reserve the right and privilege to file a motion to dismiss at the close of the case, said motion to be directed at the evidence given at this point, as well as the evidence at the conclusion of the case.

Trial Examiner Bokat: Very well.

Mr. Ball: Mr. McGowan.

W. A. McGOWAN

previously sworn, was called as a witness by and on behalf of the Respondent, and further testified as follows:

Trial Examiner Bokar: You have been previously sworn?

The Witness: Yes.

Trial Examiner Bokar: Give your full name to the reporter. [565]

The Witness: W. A. McGowan.

Direct Examination

Q. (Mr. Ball) You were in the court room yesterday when Mr. Hough testified? A. Yes.

Q. Will you tell the Examiner and the reporter and me what conversations you may have had with Mr. Hough in the week subsequent to the strike at Montgomery Ward last December 7?

A. On Wednesday night, following the trouble on Saturday, I came home from my work, and Mr. Hough and Mr. Long and Mrs. Long were waiting for me. The question was put to me by both Mr. Long and Mr. Hough as to what they should do about returning to work.

I told them at that time that I could not help them come to any decision at all, that they would have to make that decision themselves.

Q. Will you proceed to tell the course of the conversation in the meeting that night, who was present, what you said, what they said, what you did, what you talked about, how long it lasted?

(Testimony of W. A. McGowan.)

A. Well, we talked about the work at Ward's; we talked about the war; we talked about the kids and their personal things. I asked them if they would like to have a drink, and they said "yes"; and I had a little left in a small bottle, and then, later in the evening, I asked them if they would care to have another [566] drink, and they said "yes", and I asked Mr. Long if he would take me downtown and I would get another bottle. So Mr. Long and Mr. Hough and I proceeded to get another bottle, and we came back. Mrs. Long didn't drink hard liquor, so, on the way back, we got a bottle of beer.

We sat around and talked about several different things, as you do in an evening that way, and my wife suggested that she would make a lunch for them. And it came out that she was short of bread. She asked me to go to the grocery store to get a loaf of bread, and Mr. Hough said there was no reason why I should go, as he had bread in his car. So it came out, someone asked him why he had bread in the car, and he said that he was short of money and had been out selling bread.

So he brought the bread in, and my wife fixed a lunch, and a little after that Mr. Long and Mr. Hough left.

Q. Had you gone to Mr. Hough's home that day and asked him to call that evening?

A. No, sir; Mr. Hough called at the house, and I was at work. My wife so informed me, and told

(Testimony of W. A. McGowan.)

me that she told him. Anyway, he contacted me at work and said that he would like to get in touch with me. I said to come to the store or to my house, and then he asked for my number, and I gave it to him.

Q. What, to the best of your recollection, did he say to you about coming back to work? [567]

A. Well, he couldn't make up his own mind what to do, and he wanted me to express my opinion of what he should do.

Q. What did you say to him?

A. I told him, under the circumstances, it was impossible for me to help him arrive at his decision, and that was one thing he would have to do for himself.

Q. Did you suggest to him that he could come around the back way and thus avoid going through the picket line?

A. No; that was not brought up that evening at all.

Q. Did you have occasion to have another conversation with Mr. Hough?

A. Yes. Mr. Hough came to my house on Friday night of the same week.

Q. Who was present?

A. Mr. Hough, Mr. Long and myself. Mr. Hough and Mr. Long arrived at approximately the same time; it could not have been over three minutes difference.

Q. Was anybody else present?

(Testimony of W. A. McGowan.)

A. My wife was there.

Q. What was the course of the conversation on Friday?

A. The same thing came up again, that they couldn't make up their minds.

Q. By "they", whom do you mean?

A. Mr. Long and Mr. Hough.

Q. What else was said at that time?

A. The subject was brought up that they had been told that [568] the Spokane warehouse had been picketed, and they wanted to know if I knew about it, and I told them "no". It was also brought out that they wanted to know, and I told them that, if I personally wanted to know, I would buy some gas and drive over there and find out.

Q. What was said to that?

A. As far as I know, I don't recall.

Q. Did you, on this Friday evening, discuss or have any conversation about going through the picket line?

A. Yes.

Q. What was it?

A. It came out,—I know that I brought it out in this respect, that Jack Walker and a few of the boys were driving into the parking lot and coming to the plant that way. I personally said that I wouldn't go that way; that I would walk up the ramp to the second floor?

Q. By the "ramp", what do you mean?

A. The employees' entrance. It is a ramp that goes up to the second floor, which goes over the railroad track.

(Testimony of W. A. McGowan.)

Q. Would that or would that not be going through the picket line?

A. That would be going through the picket line.

Q. And did you mention anyone who had taken that course?

A. Yes, I told them that I had watched Mr. Cereghino come up the front ramp. [569]

Q. Did you make any statement at any time about what you thought the position of Montgomery Ward would be in the strike?

A. The only statement I made was this, that I didn't think,—that was my own personal opinion,—that there would ever be a closed shop.

Q. Do you, in fact, have a contract with Montgomery Ward? A. No, sir.

Q. Did you ever make a statement that you had a contract that would permit you to go elsewhere if the Portland plant were closed? A. No, sir.

Q. And you make that statement here under oath? A. Yes.

Q. Were you ever instructed by any officer of Montgomery Ward to urge any employee who was not at work to come back to work through the picket line? A. No, sir.

Q. Were you ever instructed in any way at all about what you were to say to employees about coming back to work?

A. Yes, I have been instructed several times that if and when any employee was to come to me and ask me for any advice pertaining to the joining or

(Testimony of W. A. McGowan.)

not joining of any association whatsoever, that I was to tell them that I could not give them any information whatsoever.

Q. Have you or have you not carried out those instructions? [570]

A. I have carried them out.

Q. Approximately how many men and women in Montgomery Ward hold positions of responsibility comparable to you?

A. I would say 35 or 40.

Mr. Ball: Your witness.

Cross Examination

Q. (Mr. Walker) Were all the 35 or 40 at the meeting at which you received Respondent's Exhibit No. 7?

A. Not the 40, no.

Q. Were there 35 there? A. No.

Q. Who was there?

A. It was just the other men in the same capacity I have that were under the jurisdiction of Mr. Robinson.

Q. How many would that be? A. Eight.

Q. Did they all receive similar papers?

A. Similar instructions.

Q. And did they all carry out the calls the same as you did? A. That I cannot say.

Trial Examiner Bokar: They received instructions similar to yours?

The Witness: They received instructions.

Trial Examiner Bokar: Suppose an employee didn't have a telephone number? [571]

(Testimony of W. A. McGowan.)

The Witness: Suppose he didn't have a telephone number? What do you mean?

Trial Examiner Bokat: Were there any employees who didn't have telephone numbers, who worked for you?

The Witness: Yes.

Trial Examiner Bokat: Did you receive any instructions with regard to those employees who had no telephone numbers?

The Witness: No instructions were given as to that.

Trial Examiner Bokat: Do you know whether or not Mr. Hough had a telephone?

The Witness: No.

Trial Examiner Bokat: Do you recall whether or not you telephoned Mr. Hough?

The Witness: I did not telephone Mr. Hough.

Trial Examiner Bokat: Did you visit his house?

The Witness: No.

Trial Examiner Bokat: Did you visit the homes of any people that did not have telephone numbers and tell them the same thing that you were supposed to tell them over the telephone?

The Witness: No.

Q. (Mr. Walker, continuing) Do you know if Mr. Fullerton had a telephone?

A. No, he was not on my list.

Q. Was Jack Walker working at the plant at the time that you [572] talked to Mr. Hough and Mr. Long on Friday? A. Yes.

(Testimony of W. A. McGowan.)

Q. How long had he been working after December 7? A. That I couldn't say, offhand.

Q. When did he start to work?

A. With respect to the Friday that he talked with me?

Q. With respect to the Friday that you talked with Mr. Hough and Mr. Long?

A. Well, I couldn't give you any definite answer. I would like to look at the records.

Q. What is your best recollection now?

A. What is my recollection?

Q. Did he show up on Monday following the Saturday, December 7?

A. No, I think he showed up,—I think, now,—

Q. Yes,—

Mr. Ball: I will object to that, Mr. Examiner. That is hardly proper cross examination. It does not relate the matters gone into at this time.

Trial Examiner Bokar: I will let it stand at this time.

Q. (Mr. Walker, continuing) When was it that he showed up?

A. I think that it was on Tuesday.

Q. Had you contacted Jack Walker?

A. No, sir.

Q. By telephone? A. No, sir. [573]

Q. By a personal call?

Mr. Ball: It is understood that I am objecting to this as not proper cross examination, Mr. Examiner?

(Testimony of W. A. McGowan.)

Trial Examiner Bokat: I understand; overruled.

Mr. Ball: Not relating to matters gone into on direct.

Q. (Mr. Walker, continuing) Did you make a personal call? A. No sir.

Trial Examiner Bokat: Off the record.

(Discussion off the record) [574]

Q. (Mr. Walker continuing) Where does Mr. Walker work?

A. He works for me at Montgomery Ward and Company.

Mr. Walker: That is all.

Redirect Examination

Q. (Mr. Ball) Mr. McGowan, did you have any conversation with Mr. Hough on those two evenings that were not in the presence of Mr. Long?

A. No. The conversation I could have had with him couldn't have been more than two or three minutes at the most.

Q. Do you recall whether or not Mr. Long was present through all the two meetings that you have described?

A. Yes: because they both left together both evenings.

Q. Were you in the court room yesterday when Mrs. Blackburn testified? A. Yes, sir.

Q. What is the fact as to whether or not you received a telephone call from Mrs. Blackburn?

A. I did not, and have never, talked to Mrs. Blackburn over the telephone, after December 6th.

(Testimony of W. A. McGowan.)

Q. Did you hear, in any manner, of any call Mrs. Blackburn made for you to the apartment asking for you?

A. Yes, I was notified on Tuesday morning that Mrs. Blackburn had called Monday and said she would be unable to come to work.

Q. Who reported that to you?

A. Allan Murphy. [575]

Q. You had no discussion at all with Mrs. Blackburn about that call? A. That is right.

Q. You know Mr. Fullerton? A. Yes.

Q. Do you recall any occasions you may have had to go to Mr. Fullerton's home?

A. I do.

Q. How many times had you gone to Mr. Fullerton's home? A. Two or three times.

Trial Examiner Bokar: How many?

The Witness: Two or three times.

Q. (Mr. Ball continuing) Were those prior to December 7th or subsequent to December 7th?

A. Prior.

Q. Do you recall, did you go to his home subsequent to December 7th? A. Yes.

Q. Tell us about that incident.

A. My wife and I went to Mr. Fullerton's house,—we took along a bottle of beer,—and we went in, and Mr. and Mrs. Fullerton were there, and we talked and drank the bottle of beer. Then Mrs. Fullerton was talking about a hobby that she had, about the making of fishing flies during her odd mo-

(Testimony of W. A. McGowan.)

ments at home after work. She brought those out and showed them to [576] us. Then we went in the front room and my wife sat down at the piano and tried, as usual, to play. Then,—I can't distinctly recall if Mr. Fullerton or Mrs. Fullerton sat down and did play the piano, and we sang three or four songs. Then after that, we went in the kitchen again, and there was one or two more bottles of beer opened and we sat around there and talked. Then the conversation come up about the difficulty we were having over there at the company, and Mr. Fullerton said he wouldn't go back again ever, that he would never work like he had worked. And I told him that I hadn't come over there to argue with him about his work or my work, I had come over to visit, as I had before, and that I didn't want to stay there and argue with him about it,—because it would have ended in an argument. I told the wife to get her hat and coat, that we were going to leave,—which we did.

Q. Did you ever, at any time, make any statement to Mr. Fullerton, or anybody else, that Montgomery Ward would never go union?

A. No, sir. The only statement that I had ever made to anyone was that I didn't think that they would go for a closed shop.

Q. How did it happen that you went to Mr. Fullerton's house that night?

A. Just driving around.

Q. Had you ever driven around to the homes of

(Testimony of W. A. McGowan.)

those who worked [577] for you prior to December 7th?

Mr. Walker: Just a minute. Object to that as incompetent, irrelevant, and immaterial.

Trial Examiner Bokat: Overruled.

The Witness: Yes.

Q. (Mr. Ball continuing) On what occasions?

A. On numerous occasions I have been out driving and go by the house of one of the boys who worked for me, and I have dropped in and chatted with them; I have had numerous of them over to the house, they dropped in on me. I have been to their houses on parties, and they have been over to my house on parties.

Q. What is the fact as to whether or not on the evening you came to see Mr. Fullerton, you had been out trying to get employees to come back to work?

A. No, I had not.

Mr. Ball: Your witness.

Recross Examination

Q. (Mr. Walker) Normally, on Saturdays, how long did you work?

Mr. Ball: What was the question?

Trial Examiner Bokat: Read the question, Mr. Reporter.

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. At the present time I get off around 2 o'clock in the after- [578] noon.

(Testimony of W. A. McGowan.)

Q. Well, what do you mean, at the present time? Has there been some change?

A. There has been some change since that time.

Q. In December, 1940, what time did your usual shift end?

A. Between 5 and 6,—sometimes a little later.

Q. Sometimes you would have to work later in the evening?

A. That is right. In other words, preparing for the Christmas rush.

Q. You testified before that you worked Sundays every now and then? A. That is right.

Q. And that is usually in anticipation of a seasonal upswing? A. That is right.

Q. You usually worked Saturday evenings during those periods, also?

A. On some occasions, yes.

Q. Where were you on the evening of Saturday, December 7th? Working at the store?

A. No.

Q. I mean, a little bit later than usual?

Mr. Ball: Well, I submit that was the day of the strike, and I rather imagine there was a great deal of turmoil.

The Witness: I think it was a little later: I can't say for sure. [579]

Q. (Mr. Walker continuing) Probably that night you had stayed there until about 8 or 8:30?

A. I can't say definitely what time I did get off.

Q. That would sound reasonable, would it?

(Testimony of W. A. McGowan.)

A. Yes.

Q. As your best recollection? A. Uh huh.

Q. What is Mr. Murphy's position?

A. At that time?

Q. Yes.

A. He was working for me, as correction clerk.

Mr. Ball: May I make a statement for the record? Mr. Murphy is here in the court room.

Mr. Walker: Oh.

Mr. Ball: If Mr. Walker wants to question him in any way.

Q. (Mr. Walker continuing) Did I understand you to say,—now, correct me if I am wrong in this,—did you testify that you had been to Mr. Fullerton's home since that time that you and your wife called at his house and you talked about flies?

A. No. I have never been back there since.

Q. I see. Now, were either of the Fullertons home on these two or three occasions before the 7th? A. I beg your pardon, what was that?

Trial Examiner Bokst: Read the question back.

(Whereupon the question referred to was read aloud by the [580] reporter as above recorded.)

A. Yes. His wife and he were home one time, and Mr. Fullerton was home another time.

Mr. Walker: I am sorry. I didn't get that answer.

A. I say, Yes. Mr. and Mrs. Fullerton were home one time, and Mr. Fullerton was home the other.

Q. About when was the first occasion, with re-

(Testimony of W. A. McGowan.)

spect to December 7th? Do you understand the question?

Mr. Ball: The witness testified he only went once after December 7th; and he went a few times before that.

Trial Examiner Bokar: No, no; he didn't testify to that. I don't remember he went after,—oh, yes, once, after the 7th.

The Witness: Once after the 7th and a couple of times before.

Trial Examiner Bokar: Now, Mr. Walker wants to know when it was, before the last visit, that he had dropped in at Mr. Fullerton's house.

The Witness: That is very hard to give a definite time on that. It was in,—I am sure that one of the visits was about two months before; and the other was around four or five months previous to that.

Q. Now, on the call that you made at the house about four or five months previous to December, December 7th, who received you that time? [581]

A. Mr. Fullerton.

Q. Just he alone? A. Yes.

Q. About what time of day did you come out there?

A. I would say it was about 7 or 7:30.

Q. Did you bring anything with you that time?

A. I have it with me all the time. I have a bottle of beer, as usual, on my calls.

Q. About how long did that visit last?

(Testimony of W. A. McGowan.)

A. About fifteen minutes, I would say off-hand. Mrs. Fullerton wasn't home.

Q. You didn't get the beer opened up that time?

A. I stepped up to the door, as far as I can say, and we stayed there at the door. I didn't go in because I found out Mrs. Fullerton wasn't there. We talked shop for a while, and then I left.

Q. Now what took place at the occasion about two months before December 7th?

A. Well, my wife and I went to the house; I would say we were there for half an hour or so.

Q. About what time of the day did you come to the house?

A. Around 8 o'clock, I would say. 8 or 8:30.

Q. Did you bring anything with you that time?

A. No.

Q. And did you have a talk? [582]

A. Yes. Just the usual shop talk. The women talked together.

Q. What do you mean "shop talk"?

A. Well, about the work; how it was going.

Q. Anything else? A. No.

Q. Can you tell me anything else you talked about at that time? A. No, I can't.

Q. Can you tell me anything else about the shop talk?

A. No. Just the usual, how the work was going, what needed to be done.

Q. What do you mean by that?

A. Oh, the condition of the floor, what we were

(Testimony of W. A. McGowan.)

trying to do, and everything else. Just a regular gabfest.

Q. When did you first start going around and calling on the employees who worked under you?

A. I have done that ever since I have worked at Montgomery Ward as a supervisor.

Q. Prior to July, 1940, had you made it a regular practice to call on all of the persons who worked under you? A. No.

Q. Now, did you know Donald Sipe?

A. Yes.

Q. Did he work under you?

A. Yes, sir.

Q. Did you know that any of the employees in your department [583] were being organized into a union? A. Did I know?

Q. Yes. A. I didn't know.

Mr. Ball: Well, I again question whether this has anything to do with the issues of this case.

Trial Examiner Bokar: I will let it stand, subject to some connection, at this time. I don't know. I will listen a while.

Q. (Mr. Walker continuing) Now, what was the witness' answer?

A. I did not actually know.

Q. I see.

Trial Examiner Bokar: You heard it by rumor, I suppose?

The Witness: That is right.

(Testimony of W. A. McGowan.)

Trial Examiner Bokat: That they were joining a union?

Q. (Mr. Walker continuing) About when did you first learn that?

A. Well, that was flying around out there for a year or two.

Q. Since last summer? A. Yes.

Q. The summer of 1940?

A. That is right; yes.

Q. Did you cause, or order, Mr. Sipe to go down and be interviewed by Mr. Huddleston around in July, 1940? A. No, sir. [584]

Q. Do you recall the occasion of Mr. Sipe passing out application cards for membership in Local 206, Warehousemen's Union, on your floor around July, 1940?

Mr. Ball: I object to this; it is getting into entirely different matter, and it has nothing to do with the Board's case whatsoever. It is unduly burdening this record.

Trial Examiner Bokat: I will have to say, Mr. Walker,—I mean this testimony might throw some light on so-called "various other acts", but I think it is something of which the respondent has no notice; it is something that you didn't indicate to Mr. Ball at the time you told him what you intended to put in. I believe, for that reason, I will have to sustain the objection. If you are going to go into a matter relating to an employee being questioned at the time he was distributing application blanks

(Testimony of W. A. McGowan.)

for the union,—I think it is rather late to go into it. We might continue here for days if you are going to pick up little bits of evidence that you feel might throw some light on alleged unfair labor practice of the respondent. I don't think it is fair to the respondent. I will have to sustain the objection.

Mr. Walker: Would you read my question, please.

(Whereupon the question was read aloud by the reporter as above recorded.)

Trial Examiner Bokat: Don't misunderstand me, please. I don't say that the testimony is incompetent; it may be very [585] competent; but it is not within the issues framed by this complaint.

Mr. Walker: Well, in order to save time, then, may I make an offer of proof?

Trial Examiner Bokat: Yes.

Mr. Walker: If permitted to continue the examination of this witness along the line started, the witness would testify to the following facts, as understood by me: That the person, Donald Sipe, was apprehended by Mr. McGowan in the process of distributing application cards for membership in Local 206 of the Warehousemen's Union, and thereupon he caused Mr. Sipe to go to the office of Mr. Huddleston for the purpose of a reprimand. That is all.

Trial Examiner Bokat: Well, I will reject the offer. And I will state for the record that the Board has already rested its case, with only one reservation, which doesn't cover this particular incident.

(Testimony of W. A. McGowan.)

That in the early part of the hearing, in an off-the-record discussion, respondent asked for some notice regarding the phrase set forth in the complaint "by various other acts". That, as I understand it, in an off-the-record discussion, and at the request of the Trial Examiner, Board's attorney supplied respondent with certain information that they would produce certain witnesses as to alleged acts of interference, restraint, and coercion under the phraseology of the "by various other acts". That such information supplied [586] to Mr. Ball did not contain any indication regarding the offer of proof just made by Mr. Walker. Is that correct, Mr. Walker?

Mr. Walker: It now becomes apparent to me that my purpose in attempting to elicit testimony is misunderstood. It is not being elicited by me for the purpose of proving any independent acts of coercion, interference, or restraint, in addition to that which I had related to Mr. Ball.

Trial Examiner Bokar: That is what I thought your purpose was.

Mr. Walker: My purpose in attempting to go into this matter is simply for the purpose of showing that this witness, having had first-hand knowledge of the organization being conducted among his employees on his floor, and that such organization became known to the management itself; thereafter, when the strike took place, the witness was instructed to contact all employees in his department who had

(Testimony of W. A. McGowan.)

not returned to work, for the purpose of urging them to go through a picket line, abandon their organization, and otherwise intimidate and coerce them to cease their union activity.

Trial Examiner Bokat: Well, as far as the second part of your statement is concerned, there has been no objection made to it. I will stick to my original ruling.

Mr. Walker: All right.

Trial Examiner Bokat: Let's proceed. Do you have any more questions? [587]

Mr. Walker: Nothing further.

Trial Examiner Bokat: Mr. McGowan, have you the list given to you by the management containing the names and telephone numbers of the employees?

The Witness: No, I have not.

Trial Examiner Bokat: Was this list typewritten or was it written out in longhand?

The Witness: It was written in longhand.

Trial Examiner Bokat: Can you recall whether there was a telephone number for Mr. Fullerton and Mr. Hough on that list?

The Witness: There was none for Mr. Fullerton and Mr. Hough; no. Not on my list.

Redirect Examination

Q. (Mr. Ball) Did the list cover all the employees in your department?

A. No. I only had a few of them.

(Testimony of W. A. McGowan.)

Q. Do you know whether some other people were assigned the task of calling men in your department? A. Oh, yes. Several of them.

(Off the record discussion.)

Trial Examiner Bokat: On the record. Redirect examination.

Q. (Mr. Ball continuing) Now, the list you were given to call, did it or did it not contain names of people other than those in your department? A. No. Just people in my department.

[588]

Q. Do you know whether it contained all of the names of all of the people in your department at that time? A. It did not.

Q. Do you know whether others were assigned the task of calling, under the same instructions, people who were in your department?

A. There were several people.

Q. Were you ever given any instructions to make any personal visits on any of the employees in your department? A. No, sir.

Mr. Ball: That is all.

Mr. Walker: Were the others, who were assigned the task of calling, those people in your department?

The Witness: Were the others, what?

Mr. Walker: Were the others, who were assigned to calling employees, were the others people in your department?

Mr. Ball: Don't you mean, were the others,

(Testimony of W. A. McGowan.)

who called people in Mr. McGowan's department, themselves employees of Mr. McGowan?

Mr. Walker: That is correct?

The Witness: No.

Mr. Walker: That is all.

Trial Examiner Bokat: Witness excused. We will take a ten minute recess at this time.

(Thereupon a short recess was taken, after which the following [589] proceedings were had:)

Trial Examiner Bokat: The hearing will now be in session.

Mr. Walker: I have now received the designation of the Trial Examiner and ask that it may be added to and made a part of Board's Exhibit 1.

Trial Examiner Bokat: It will be received and marked in evidence as part of Board's Exhibit 1.

(Whereupon the document hereinabove referred to was marked in evidence and made a part of the Board's Exhibit 1.)

Mr. Walker: It is stipulated and agreed between the parties that the individual, William Hough, in the month of December, 1940, did have a telephone. That the person,—

Mr. Ball: Fullerton did not?

Mr. Walker: Robert Fullerton did not.

Trial Examiner Bokat: All right. It is so stipulated. [590]

JOHN BIGGS LONG,

called as a witness by and on behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Bokat: Give your full name and address to the reporter.

The Witness: John Biggs Long, 3015 Southeast Yamhill.

Q. (Mr Ball) Have you ever had any occasion to talk over the testimony in this case with me?

A. No, sir. Never seen you until today.

Q. You are the Mr. Long who was mentioned in the testimony of Mr. McGowan a few minutes ago?

A. Yes, sir.

Q. And you were at Mr. McGowan's home on the two occasions he described in his testimony?

A. I was.

Q. Will you tell the examiner and the reporter and counsel what took place at those two social gatherings?

A. You mean you want me to start at the beginning and go clear through it?

Q. Well, to the best of your recollection.

A. Well, the first night that I was out at Mr. McGowan's, arrived there with my wife, Mrs. Long, and Mr. McGowan wasn't there. Mr. Hough came in, and we waited for Mr. McGowan to come. Prior to this I had called up Mr. McGowan and asked him [591] if I may come over to talk to him.

(Testimony of John Biggs Long.)

Q. Speak a little louder, please.

A. My intentions to go there was to get the truth.

Trial Examiner Bokat: About what?

The Witness: About the goings on between,—at the store; and I tried to get some information,—if the union actually was doing what they claimed they were doing.

Q. At that time had you reported to work on December 7th? A. Had I reported? No.

Q. Had you reported to work on Monday, Tuesday, or Wednesday of the following week?

A. No, sir.

Q. You had not been out working, then, prior to the time you went to Mr. McGowan's home?

A. I had not.

Trial Examiner Bokat: Mr. McGowan was your superintendent?

The Witness: Yes, sir. Supervisor.

Trial Examiner Bokat: All right. Proceed.

Q. Had you ever had any occasion to go to Mr. McGowan's home before that time?

A. No, sir. I had never been to his home before then. I knew where he lived, and I had gone by there.

Q. Had he ever stopped in at your home?

A. No, sir.

Q. What did you say to Mr. McGowan after you got to his home? [592]

A. Well, I come right to the point that I had

(Testimony of John Biggs Long.)

come over for; and that was to get information that I just previously told you about.

Q. Was Mr. Hough there at that time?

A. No, sir. He was there when Mr. McGowan came in.

Q. You were there before Mr. Hough came?

A. Yes, with my wife.

Q. What did Mr. McGowan tell you at that time, in Mr. Hough's presence?

A. I tried to get Mr. McGowan to tell me,—advise me whether to come back to work or not.

Trial Examiner Bokat: Were you a member of the union at that time?

The Witness: I don't know as you would call it a member of the union; but I was one of the boys.

Trial Examiner Bokat: Had you signed anything for the union prior to that time?

The Witness: I had signed an application to join the union.

Trial Examiner Bokat: All right. Proceed.

Q. (Mr. Ball continuing) Had you come to Mr. McGowan's home in response to any telephone call or any suggestion on the part of anybody that you do so? A. Absolutely not.

Q. What did Mr. McGowan say to you?

A. Mr. McGowan told me that he could not advise me what to do [593] under the circumstances.

Q. Did Mr. Hough ask Mr. McGowan any question?

(Testimony of John Biggs Long.)

A. I think,—in fact, I know,—that his intentions were the same as mine. He wanted to get this information from Mr. McGowan, and the same questions came up and they were answered the same way.

Q. Did Mr. McGowan, at any time, suggest to Mr. Hough or to you, in your presence, that you come back to work and that you come through the back way so as not to go through the picket line?

A. Absolutely not; because I don't think that Mr. McGowan would be,—I believe that would be insulting his intelligence to think that he would do that,—it is an imaginary line established around the establishment. Why would he?

Q. Well, at least, he didn't make any such statement? A. No.

Q. Who was present during the course of the evening; during the time these conversations took place? A. Mrs. Long and Mrs. McGowan.

Q. Did Mr. McGowan say, at any time, that he had a contract with Ward's so that if the plant was closed down he would go to work some place else for them? A. No.

Q. Did he say anything like that?

A. I believe that where Mr. Hough has drawn his conclusion [594] from is Mr. McGowan's beliefs,—that he has got men in that store that he has worked on who carried his ideas through the store; and I believe that Mr. Hough is taking the

(Testimony of John Biggs Long.)

statement that Mr. McGowan believes that as long as he lives his ideas, some of them, will still be in the store even though he is gone.

Q. Did Mr. McGowan say to Mr. Hough, at any time, that Ward's would not go union, but would close the place down first?

A. Mr. McGowan told us that he didn't think that Montgomery Ward's would ever have closed shop.

Q. Did he make that statement voluntarily, or did it follow questions on the part of either you or Mr. Hough?

A. It followed questions on the part of me and Mr. Hough.

Mr. Ball: That is all.

Cross Examination

Q. (Mr. Walker) Mr. Long, you stated you wanted to get the truth of the matter. The truth about what?

A. Well, we had been informed that Oakland was being picketed and they were out on strike; Spokane was out on strike; that St. Louis had a picket line around it; Kansas City,—a dozen it seemed like to me. I couldn't see, for the life of me, how so many places could be in this condition and the store still operate; and that they were able to spread this strike from kingdom come, I guess, as far as that is concerned.

Q. You thought the union was exaggerating to you?

(Testimony of John Biggs Long.)

A. I did. I figured that Mr. McGowan would know it. I did [595] not get this information from Mr. McGowan.

Q. You felt that Mr. McGowan would be better-informed than the union?

A. That is right.

Q. And Mr. McGowan was the supervisor?

A. Yes.

Q. Where did you learn about Oakland, Spokane, St. Louis, Kansas City, and other points to kingdom come?

A. At the meetings?

Q. Union meetings?

A. Yes, sir.

Q. Was there something that caused you to doubt the things that the union had told you?

A. Yes. Just as I told you.

Q. What was it?

A. That I couldn't see how such a widespread operation could be carried on and Montgomery Ward still operate.

Q. What was it you were told at the union meetings about Oakland, Spokane, St. Louis, and Kansas City?

A. No, I will not say that the union told me that they were on strike?

Q. I know. I am just asking you to tell me what you learned.

A. Sometimes I figured the whole nation was out on strike the way rumors were going around.

Q. What did the union tell you? [596]

A. That I won't say, because I can't quote it.

(Testimony of John Biggs Long.)

Q. What is your best recollection?

A. That,—well, I will put it this way: That one house was out and that other houses was being picketed.

Q. Yes; that is what I wanted to know. What was the difference between those that were out and those that were being picketed?

A. That is something I can't tell you, personally not knowing the operations of unions.

Q. At any rate, you believed that the union wasn't telling you the truth. Is that correct?

A. That is right.

Q. And you thought that Mr. McGowan would tell you the truth?

A. I figured that through the information I could get from Mr. McGowan and the information I had already obtained from the union, and through the stores, that I could draw my own conclusion, and decide,——

Q. Did you think that Mr. McGowan would tell you the truth in the matter?

A. I don't see why I would have a reason to believe that.

Q. Now, can you answer my question? Did you believe that Mr. McGowan would tell you the truth in the matter?

A. Yes, I believed he would.

Q. Are you working now? A. Yes. [597]

Q. You are still under Mr. McGowan?

A. That is right.

Q. Did you work on December 7th?

(Testimony of John Biggs Long.)

A. Yes,—oh, no, I did not work on December 7th.

Q. When did you return to work after December 7th?

A. Eleven days after December 6th, on Tuesday.
Mr. Walker: That is all.

Mr. Ball: That is all.

Trial Examiner Bokat: Just one question. Did you know that Mr. Hough was going to be there that evening?

The Witness: I did not.

Trial Examiner Bokat: Did you have a telephone in your house on December 7th, or within a day or two thereafter? A. No, sir.

Trial Examiner Bokat: How many days was it, after you saw Mr. McGowan, you returned to work?

The Witness: Four days.

Trial Examiner Bokat: Was there a picket line there when you returned to work?

The Witness: Yes, sir.

Trial Examiner Bokat: How did you go in?

The Witness: By the ramp, the front door.

Trial Examiner Bokat: Did you cross the picket line?

The Witness: I did.

Trial Examiner Bokat: That is all. Any further questions? [598]

Mr. Ball: Why did you return to work, Mr. Long?

Mr. Walker: Object to that as calling for a conclusion of the witness.

(Testimony of John Biggs Long.)

Trial Examiner Bokat: Oh, yes. I will let it stand.

The Witness: You want me to answer?

Mr. Ball: Yes.

Trial Examiner Bokat: You may answer.

The Witness: Because I had decided that was the right thing to do.

Mr. Ball: That is all.

Mr. Walker: Just one question, if I may?

Trial Examiner Bokat: Go ahead.

Q. (Mr. Walker) At the union meetings prior to December 7th, had you been told that the union had proposed a contract to Montgomery Ward which, by its terms, sought a closed shop?

A. Repeat that question.

Mr. Walker: Will you read it.

(Thereupon the question referred to was read aloud by the reporter as above recorded.)

A. No, I wasn't.

Q. (Mr. Walker) How did the matter of closed shop happen to arise in this conversation with Mr. McGowan?

A. We asked Mr. McGowan that, if he figured that the store would ever go union. He come back with the statement,—just as I told you before,—that he personally did not think there [599] would ever be a closed shop in Montgomery Ward's.

Mr. Walker: That is all.

Mr. Ball: Thank you, Mr. Long.

Trial Examiner Bokat: Witness excused.

(Witness excused)

Mr. Ball: I want to state for the record that Mr. Murphy and Mrs. McGowan are here in the court room. I don't intend to produce them as witnesses; but I will keep them here for the time of the hearing, should the Board desire to call them.

Trial Examiner Bokat: I think it is in due order that we recess at this time for lunch. Do you gentlemen want more than an hour? Oh, suppose we make it until 1:15.

Mr. Ball: That will be satisfactory.

Trial Examiner Bokat: Hearing recessed until 1:15 p. m.

(Whereupon at 11:55 a. m. the hearing was recessed until 1:15 p. m.) [600]

Trial Examiner Bokat: The hearing will please come to order.

You made a statement to me, Mr. Ball, in an off-the-record [601] statement, that you did not intend, as I understand it, to dispute the testimony given by Mr. Dixon as the result of any checks that he may have made with regard to the number of designations or applications that they had within the claimed unit, but that your point of view, or dispute, as I understand it, is with the appropriateness of the alleged unit contended for by the union; is that correct, or, if I am not correct, I should be very pleased to have you put me right.

Mr. Ball: I think that it could be said that by agreement to the stipulation which stated that the witness Dixon would testify that he had these

designations, the respondent is willing to accept the truth of the testimony of Mr. Dixon about any matters covered by the stipulation.

Trial Examiner Bokat: That is sufficient.

I understand that you have another letter which you desire to produce which you have found in your files?

Mr. Ball: Yes.

(Thereupon a document was marked as Respondent's Exhibit 24 for identification.)

Mr. Ball: I offer Respondent's Exhibit 24 in evidence.

Mr. Walker: No objection.

Trial Examiner Bokat: It will be received in evidence as Respondent's Exhibit 24.

(Whereupon the document heretofore marked as Respondent's Exhibit 24 for identification, was received in evidence.) [602]

RESPONDENT'S EXHIBIT No. 24

Airmail

Personal & Confidential

Oakland, California

October 24, 1940

Mr. J. A. Barr

Law Department

Chicago, Illinois

Re: Retail Clerks Union—Portland

On Tuesday, October 22, Mr. Barth and I met with representatives of the Retail Clerks Union in

the Heathman Hotel in Portland. The representatives were Messrs. Dixon and Langford in behalf of the Retail Clerks and Mr. Hicks in behalf of the Office Workers Union.

At the start of the meeting I referred to the Unions' letter of October 2 to Mr. Barth in which they stated that they have an overwhelming majority of our store employees. My first comment was that their letter was incorrect in beginning with the phrase "As you know". I explained that as a matter of fact Mr. Barth did not know whether or not the Retail Clerks had a majority, and as the Union representatives knew that, there was no reason to insert the phrase "As you know" in the letter. Mr. Dixon agreed that the letter was incorrect in that respect and we proceeded with that understanding.

I asked Mr. Dixon and Mr. Hicks what percentage of employees each claimed to have. Mr. Hicks stated the Office Workers Union had signed up 25 of our office workers, which he said was 70% of the total. Mr. Dixon stated that the retail Clerks had signed up 175 employees, which he stated was 95% of the total store employees, excluding the office workers. Mr. Dixon stated that they would be willing to give us that information in a letter addressed to Mr. Barth. However, I made no request for a written statement at that time.

Later I checked the figures with Mr. Barth and found that there are 53 office workers in the store and 70% would be 37. There are 209 employees,

excluding the office workers, and 95% would be 198. Therefore, it appears that Messrs. Dixon and Hicks inflated their percentages and according to Mr. Hicks' statement that the Office Employees Union has 25 of our people, that amounts to less than 50%.

After the preliminary discussion about the question of majority representation, Mr. Dixon suggested that we discuss each section of the proposed agreement in the order in which the sections are listed. We replied that any procedure he desired to follow would be perfectly all right with us and we would be glad to follow his suggestion in that regard. When he asked if Section 1 would be acceptable to the Company I replied that we could not agree to the provisions of Section 1. As you will see from your copy of the proposed agreement, Section 1 provides for a union shop.

We explained that it was our policy to refrain from influencing our employees either directly or indirectly in their choice of a labor organization. We further explained that our employees are free to join a labor organization if they so desire, but that the Company does not require that its employees become members of any labor group. We stated very definitely that the Company could not agree to making membership in the Retail Clerks Union a condition precedent to employment. By way of illustration we mentioned that we might desire to hire a person with excellent qualifications and who after a few days on the job might show marked ability, whereas that same person, for rea-

sions personal to him, might not desire to join a labor organization. Under the circumstances we would consider it very unfair to that employee to require that he either join the Retail Clerks Union or be replaced. Also, we stated that the Company does not require that its employees belong to any certain church or any certain lodge, such as the Elks or Masons, and the Company does not feel it would be fair to its employees to require them to join a labor organization. Then too, we explained it would be unjust to require employees who are transferred to the Portland store to become members of the Retail Clerks Union. Perhaps those employees would have been in the employ of the Company for a matter of years, and it certainly would be unfair to require that when they come to Portland they must join a union.

When he had finished stating the reasons for the Company's position, Mr. Dixon expressed great surprise and stated this was the first time in his long experience that any employer had ever objected to Section 1. He thought that Section 1 was a harmless provision and our acceptance of that provision would merely be recognition of the Union. Then he stated that unless we could agree to Section 1 as written, he could see no reason for discussing the remaining sections of the proposed agreement. He said that at the A. F. of L conference in Cleveland last summer, it had been decided that no contract should be submitted to an employer unless it contained a provision for a union shop. Mr. Dixon

inferred that he would be the laughing-stock of the Labor Temple in Portland if he were to submit a contract without a union shop provision in it. Therefore, he said he would have to demand that we agree to Section 1.

Our reply was that we could not agree to Section 1. We stated that in order to agree to Section 1, we would have to violate our Company policy, which we would not do. Then Dixon said he would have to return to the employees to give them our position and that he did not know what action they would decide to take.

The next day as I was checking out of the hotel, Dixon called and asked if we had any counter proposal to offer. He stated that since we could not agree to Section 1 of the proposed agreement that we should offer some counter proposal. I explained that Section 1 proposed that we agree to something which is contrary to the policy of our Company and our counter proposal would be that the work of organizing the employees should be done by the union and whenever a new employee was not a member of the union, we would have no objection to the union attempting to secure that employee as a member. Also, I called to Mr. Dixon's attention the fact that he had decided not to discuss the remaining provisions of the proposed agreement, whereas we had come to the meeting prepared to discuss each provision. He then asked if we had any counter proposal to offer as to the entire contract. To this question I replied that there was certainly no rea-

son to talk about a counter proposal for the entire contract, as the only provision which had been discussed was Section 1. He then wanted to know when we could get together to discuss the remaining provisions. I told him I would probably be in Portland sometime within the next two weeks and would be glad to meet with him at a time which would be mutually convenient. I explained that Mr. Estabrooks had requested the meeting in behalf of the Mail Order employees and Dixon said he would keep in touch with Estabrooks to find out when I would next be in Portland. Dixon indicated he would like to resume the discussion of the agreement which he has submitted. It appears that overnight Mr. Dixon decided that our refusal to agree to Section 1 should not be a bar to future negotiations.

During our meeting on Tuesday Dixon made the statement that the Retail Clerks were having trouble with Sears Roebuck in Portland, that they had filed a charge of unfair labor practice against Sears. I thought this statement was interesting in view of the article about Sears which appeared in the American Labor Citizen.

W.B.P.

W. B. POWELL

Law Department

WBP-RD

Mr. Ball: I will call Mr. Powell.

W. P. POWELL

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Will you give your full name and address to the reporter?

The Witness: W. P. Powell, Oakland, California.

Direct Examination

Q. (Mr. Ball) You are the Mr. Powell who has been mentioned at several points in these proceedings? A. Yes.

Q. How long have you been associated with Montgomery Ward, Mr. Powell?

A. Since June, 1934.

Q. And in what capacity have you been employed?

A. My first position with the company was in the capacity of an order filler, in which I worked for some time.

Q. Where?

A. That was in the Chicago Mail Order House.

Q. Then what did you do?

A. Well, during a period of about,—well, almost exactly four years,—I was employed in various merchandise divisions as a stock man and as a packer. I worked in the billing and packing, in the order-clerical department, and in the adjustment department. [603]

(Testimony of W. P. Powell.)

Q. And then at the expiration of a period of four years, where were you located in the company?

A. In August, 1938, I was transferred to the law department of the company.

Q. When had you been admitted to the bar, and where had you taken your legal education, and during what time?

A. I was admitted to the bar of the State of Illinois in 1938, and I took my legal education at John Marshall Law School in Chicago.

Q. You took that work during the time that you were employed in Chicago?

A. Yes. The John Marshall Law School is a night school.

Q. At what time did you come into contact with the company's labor relations problems?

A. Well, the first contact I had was, oh, within two months after I came into the law department, which would be about September, 1938.

Q. At what time were you transferred to Oakland, California? A. On August 1, 1940.

Q. And at that time, what was told you about your responsibilities with regard to company labor relations problems on the Pacific Coast?

A. At the time that I was assigned to collective bargaining as my responsibility, Mr. Barr instructed me that I had full authority to negotiate with the representatives of our employees and that

[604]

if that question was asked me, I should so state.

(Testimony of W. P. Powell.)

Q. And what has been your understanding as to your responsibilities in the conduct of those negotiations?

A. My understanding has been that before we should go into negotiations with a union's representatives, it is my responsibility to discuss with the persons charged with the management of our particular branch, which, in this particular case would be Mr. Huddleston of the Mail Order house and Mr. Barth of the retail store,—to discuss with them questions of wages, as to whether the company's wage policy is being followed, and problems as to hours and working conditions which are governed largely by practices in the community in which the branch is located.

Q. What would be your understanding as to the manner in which wage adjustments might be made as the result of negotiations in collective bargaining?

Mr. Walker: Excuse me. May I object to this question as to form, particularly as to calling for an opinion and conclusion of the witness, and, further, that the matter is incompetent, irrelevant and immaterial.

Trial Examiner Bokat: I will accept it, subject to further connection, as to instructions or authority in that regard.

Mr. Ball: I wanted to show his authority.

Trial Examiner Bokat: I will let it stand as a preliminary [605] matter.

The Witness: May I have the question read?

(Testimony of W. P. Powell.)

Trial Examiner Bokat: Yes.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. If during the course of the bargaining process, wage demands are presented, and after I consult with the management, which in this case would be Mr. Huddleston and Mr. Barth, and they or either of them in their particular branch feels that a wage increase,—either a blanket increase or perhaps increases in certain divisions,—is warranted under the company's wage policy, we might then very readily offer such increases during the course of negotiations.

Trial Examiner Bokat: How did you arrive at that understanding, Mr. Powell? What caused you to arrive at that understanding? In other words, were you so instructed by Mr. Barr or any other particular official of the company?

The Witness: Yes, I was, although, I will say probably not in those exact words. However, I was instructed that it was my responsibility to confer with the management at the various branches to determine if the company's wage policy is being followed.

Trial Examiner Bokat: And what was that policy?

The Witness: Briefly, that policy is that we desire, wherever possible, to pay wages which are equal or better than wages [606] being paid for

(Testimony of W. P. Powell.)

comparable jobs by other employers in the same community.

Q. (Mr. Ball, continuing) As a matter of fact, did you have occasions to make such examinations in the questions of wage rates and working conditions in various locations? That is, where you were engaged in the collective bargaining process?

A. I recall particularly here in Portland, before we entered into a discussion with Mr. Estabrook, I sat down with Mr. Huddleston and Mr. Glassley, who was the personnel manager, to discuss the question of wages, and at that time Mr. Glassley produced and showed to me what is called a wage survey, which, Mr. Glassley told me, is made quarterly, and which shows rates,—monthly rates and, I believe, in some cases, weekly rates,—paid by other employers for jobs similar to ours in this community.

Q. Have you had occasion to report to Mr. Barr the fact that you made such surveys, or that you have had occasion to examine such surveys in connection with collective bargaining proceedings?

A. Yes, I have reported that back to Mr. Barr.

Q. And has he approved of your doing so?

A. Yes.

Q. What is the fact as to whether or not you have discussed with him problems that have arisen during the course of the negotiations, as to whether or not existing policies, as you [607] understood them, were to be continued or carried out in the particular situations?

(Testimony of W. P. Powell.)

A. Well, there has been a great deal of conversation and discussion between Mr. Barr and myself with regard to problems arising out of bargaining sessions.

Q. What common factor, as you understand it, exists in the company's policy with regard to various forms of closed shop, the problem of seniority and the problem of arbitrating discharges and disputes, as to promotions, promotability and demotions?

Mr. Walker: Same objection.

Trial Examiner Bokat: Overruled.

A. Is your question what common factor is,——

Q. (Mr. Ball, continuing) Yes, in the policy.

A. I would say the common factor is a principle in which the company believes,—by that, I mean the management of the company,—that in order to operate this business, the mail order business and the retail store business successfully, the ultimate decision in matters affecting the hiring and discharge of employees and matters generally affecting the operation of the business, should remain in the management of the company.

Q. You recognize that is subject, of course, to the effect of the collective bargaining process, including the economic situation in which the company might find itself in a given situation? [608]

A. Yes, that is true.

Q. Now, Mr. Powell, do you recall that a Mr.

(Testimony of W. P. Powell.)

Glazier of Seattle was present during some of these meetings?

A. Yes, I recall that. I met Mr. Glazier for the first time in Mr. Huddleston's office during the meeting of December 13, 1940.

Q. And what is the fact as to whether or not Montgomery Ward has any operation in the City of Seattle which employs employees who might be acceptable or eligible for membership in the Warehousemen's Union?

A. Well, of course, I can't say whether certain employees would be eligible for membership in a certain union, but I can say that the operation I know of in Seattle is an order office.

Q. And that is, simply, what?

A. An order office, is an office where customers can come in the same as they would come into a retail store, but, instead of actually buying merchandise right there, they select their merchandise from the catalogue, and the order is then sent in to the mail order branch, from which it is either sent direct to the customer or it is sent to the order office where the customer picks it up.

Q. To your knowledge, has Mr. Glazier made any claim to speak for or represent any employees of Montgomery Ward in the City of Seattle?

A. No, he has not. [609]

Q. I hand you respondent's exhibits 19, 20, 21, 22, 23 and 24, and I will ask you if you know what they are; if so, describe them.

(Testimony of W. P. Powell.)

A. Yes. The exhibits that you have mentioned are letters which I wrote to Mr. Barr.

Q. Were those letters all written by you on the dates that they indicate? A. Yes, they were.

Q. And are the facts set forth as described in those letters, those exhibits, correct as you now recall? A. Yes, they are.

Q. And do they substantially and accurately describe the matters that took place in the several meetings to which these exhibits relate?

A. Yes, they do. I might say that the letters, which are reports of meetings,—in fact, I believe they all are,—were dictated on the day the meeting was held or the following day.

Q. And were they intended by you to be full and complete reports of the essential matters which had taken place in those meetings?

A. They were: It was my intention to include in those letters the statements of what was said by the parties who were engaged in the collective bargaining session.

Q. Now, turning to Respondent's Exhibit 20, and using that to [610] refresh your recollection, would you tell the Examiner and the reporter what took place at the meeting of November 25 in Oakland, California?

Mr. Walker: Mr. Examiner, I object to this on the ground that the instruments now in evidence constitute the best evidence in that regard.

Trial Examiner Bokat: Mr. Ball, do you intend

(Testimony of W. P. Powell.)

to have the witness repeat what is said in Respondent's Exhibit 20, or to amplify matters set forth therein?

Mr. Ball: I intend to have him amplify some of the matters which, in this letter, are not described in detail, but are described more in the way of a conclusion or general statement.

Trial Examiner Bokat: If that is your purpose, all right, I will overrule your objection.

A. The meeting of November 25, 1940, was held in Mr. Clerin's office in Oakland, California. Mr. Clerin is the manager of the mail order house in Oakland. The company was represented by Mr. Clerin, Mr. J. P. Barr, Mr. Jenkins, Mr. Cook and myself.

Q. (Mr. Ball, continuing) Was Mr. P. W. Harris there? A. No, he was not present.

Q. All right, go ahead.

A. The unions were represented by Mr. White of San Francisco, Mr. Estabrook and Mr. Holmes of Portland, Mr. Wood, Mr. Cohn, and Mr. Nathan of the Retail Clerks' Union in California, and Mr. Peckner of San Rafael, and the others, I believe, are [611] stated in the memorandum. The meeting was opened up by Mr. White, who said that the committee that we saw before us then represented the Warehousemen and Retail Clerks in the eleven Western States.

He said that those organizations had been attempting to organize Montgomery Ward, and in one case,

(Testimony of W. P. Powell.)

he said, in Portland, the Warehousemen's Union had been certified by the National Labor Relations Board.

He said that Mr. Estabrook had attempted to get a signed contract for his group, but up to this time Montgomery Ward had refused to sign a contract.

He said, "Our purpose here is to see that we get a signed contract."

Then he said that from many localities he was receiving reports of intimidation and coercion of the employees by the company. I interrupted Mr. White and asked him if he could let me know where those instances occurred, and whom they involved. His answer was, "You will find out when the time comes."

I said to Mr. White that he had charged instances of intimidation and coercion over the telephone to me, and that I had read it in the newspaper, the *American Labor Citizen*, and he had written me a letter stating that, and I was anxious for him to let me know what some of those instances were so that, if the company was at fault, we could take corrective action. [612]

And I said, further, "Up to the present time, you have not furnished me with a single instance of intimidation and coercion which you have alleged, and unless you do, I don't see that there is much the company can do to correct it."

Mr. White said he would attempt to compile that

(Testimony of W. P. Powell.)

information and let me know. And then he said, "Will your company sign a contract?" I said that the answer to that question depended somewhat upon what proposal he would have to suggest. I said, "That depends on the particular proposal that you present." He said, "Well, I am talking about Article 2 in the Warehousemen's proposal". I replied that we did not have a proposal before us, and I didn't recall exactly what article 2 provided. He said that "Article 2 is the Union Shop clause which required employees must be members of the union."

I said that in our meeting with Mr. Estabrook we had objected to that provision, and we had stated our reasons fully, and that the company's position was the same in regard to that provision.

Mr. White then said, "Unless the Company will agree to that union shop clause at Portland, the American Federation of Labor, through the Warehousemen and Retail Clerks in the eleven Western States, will strike Montgomery Ward immediately." He said, "All I have to do is to go back to my office, send a teletype to various local branches, and tomorrow there will be picket lines around all your branches in the 11 Western States." [613]

Then he went on to say, "And that is what I am going to do unless you agree to Article 2 in the proposal that I have mentioned."

I said to Mr. White that if the company's position changed, I would let him know. At that time,

(Testimony of W. P. Powell.)

Mr. Nathan rose from his chair and said that that is all they wanted to know. I believe his exact words were "That is all we want to know."

And then Mr. White started to speak again, and Mr. Nathan sat down.

Mr. White said, "What kind of a closed shop will you agree to?" I answered that the closed shop provisions which had been submitted to the company thus far had not been acceptable. Mr. White handed me a written document and said, "Will you agree to section 2 in that proposal?"

Q. Did you know what that document purported to be?

A. I did not, when it was handed to me, but when I examined it I saw that it was articles of agreement as drawn up by the Retail Clerks' Union, Local 47, which is in Oakland, California; and I stated that we had not as yet met with the Retail Clerks in Oakland, and I was wondering about the value of discussing that particular section with regard to the Retail Clerks.

Mr. White said, "I want to discuss section 2 as it applies to the Warehousemen's Union in Portland which has been certified." I asked him for a minute to look over the section, which he said was perfectly all right, and when I had looked it over, I answered

[614]
that that provision was not acceptable for the same reasons that Article 2 in the Warehousemen's proposal was not acceptable.

And Mr. White said, "Is any part of it ac-

(Testimony of W. P. Powell.)

ceptable? I asked him if he wanted me to touch upon each paragraph separately, and he said, "Yes". It happened that the proposal was split up into five paragraphs which were lettered A, B, C, D, and E, I believe, and I took each paragraph,—

Q. May I interrupt? When you said that the proposal was divided into five sections, what did you mean by "proposals"?

A. By that I mean Section 2. We were discussing only Section 2, and that particular section was broken down into five sub-paragraphs, and we took each one up in order, and I explained why each one was not acceptable.

Q. Then what occurred, Mr. Powell?

A. Then Mr. White said, "If you are refusing to agree to Section 2 in that proposal, I will let you know right now that we are going to take strike action against Montgomery Ward." He said, "I will give you 24 hours to change your position", and then he stated that he would give us until Thursday, November 28, at noon, to change our position; and then he further said, "I warn you, you had better call up your Chicago office and have them change their position and agree to a signed contract containing Article 2 or we will take strike action immediately." [615]

He asked if I would telephone him before noon of Thursday, November 28, and I said I would rather,—yes, I said I would.

At that point, Mr. White and the other union

(Testimony of W. P. Powell.)

representatives rose from their chairs and left the office.

Trial Examiner Bokat: What was the conversation about the five paragraphs of Section 2?

A. Well, I am afraid that I would have to have the proposal before me before I could give an accurate statement as to that.

Trial Examiner Bokat: Did you accept any of the five?

The Witness: No, we did not.

Trial Examiner Bokat: All right.

The Witness: I might, by way of explanation say that Section 2 began with a sentence like this: "The employees shall be members of the Union and shall be employed in the manner following:" and then the five sections pointed out the provisions covering getting into touch with the Union in order to fill vacancies and so on.

Trial Examiner Bokat: I am not particularly interested in what the paragraphs stated, but merely in the results, because you testified that Mr. White took the position that, if you didn't agree to it, they would issue an ultimatum of some kind to take strike action; but you didn't indicate what your position was. I simply wanted to make the record clear on that point. [616]

The Witness: We did not accept any of them.

Trial Examiner Bokat: All right.

Q. (Mr. Ball) I hand you what has been marked as Respondent's Exhibit 1., which had been previ-

(Testimony of W. P. Powell.)

ously offered and rejected, and ask you if you know what that is?

A. Yes. It is a copy of the American Labor Citizen.

Q. Did that come into your hands about the date indicated at the heading of the paper?

A. Yes. It was addressed to me. I don't recall the exact date.

Q. Have you read the story about "Move on Montgomery Ward. Deadline all set."?

Mr. Walker: Just a moment. I apprehend that, subsequent to this question, the questions which follow may have to do with the contents of the article. I object to this question and to any other question along the same line that pertains to the article or the contents thereof, or the document.

The grounds of my objection are that the document and its contents are hearsay, incompetent, irrelevant and immaterial to any issues in this proceeding, and, furthermore, any statements which may be in there would not be binding upon any parties to this proceeding.

Trial Examiner Bokst: I will overrule the objection. I will let the question stand purely as a preliminary one.

Mr. Ball: Will you read the question, Mr. Reporter? [617]

(Thereupon the pending question was read aloud by the reporter as above recorded.)

Mr. Walker: Mr. Examiner, rather than inter-

(Testimony of W. P. Powell.)

pose an objection to each succeeding question, may it be understood that my objection runs to the entire line pertaining to the article or the contents of it, or to the instrument itself?

Trial Examiner Bokat: Well, of course, the instrument itself has been rejected, and I assume counsel is trying to lay another foundation.

I will, for the record, show that you are objecting to the entire line. I don't say that I am going to take the same position on each question that is asked.

A. Yes, I have.

Q. (Mr. Ball, continuing) Did you, on the same date that you received it, read the story?

A. Yes.

Q. And did you at that time understand that that referred to the meeting of November 25?

Mr. Walker: I will object to that as calling for a conclusion of the witness and a conclusion of law, asking the witness to express an opinion.

Trial Examiner Bokat: What is the date of the publication that you hold in your hand, Mr. Witness?

The Witness: The date is Friday, November 29.

Trial Examiner Bokat: All right. I will let you answer the [618] question. Read it back.

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Yes, I did.

Q. (Mr. Ball, continuing) And did you under-

(Testimony of W. P. Powell.)

stand that the deadline referred to in this article was the deadline set by Mr. White in the meeting?

Mr. Walker: I will object to that on the ground that it assumes facts not in evidence, and asks for a conclusion of the witness.

Mr. Ball: I think that question is objectionable in form. Let me rephrase it.

Trial Examiner Bokar: All right.

Q. (Mr. Ball, continuing) Where that article refers to a deadline set by the A F of L against Montgomery Ward, did you understand that it referred to what Mr. White had said about the necessity of Montgomery Ward agreeing to a closed shop clause discussed in the meeting of November 25?

Mr. Walker: I will object to that on the ground that it is a leading question, and, furthermore, on the ground that it calls for a conclusion of the witness, and is incompetent, irrelevant and immaterial.

Trial Examiner Bokar: I think the objections so far have been technically well taken, but I will let him answer the question and see what develops. Overruled [619]

A. Yes. I might say the meeting of November 25 was the last meeting prior to the issuance of this paper.

Mr. Walker: I will object to that and move that the last portion of the answer be stricken.

Trial Examiner Bokar: Yes, strike the last part out as not responsive.

(Testimony of W. P. Powell.)

Q. (Mr. Ball, continuing) What is the fact as to whether or not you had subsequent meetings with Mr. White?

A. I did have subsequent meetings with Mr. White.

Q. What was the next meeting you had with Mr. White subsequent to your meeting of November 25?

Trial Examiner Bokar: You may refresh your recollection by any memorandum, if you so desire.

A. That is not contained in the memorandum that I have before me. I met with Mr. White on December 6, 1940.

Q. (Mr. Ball, continuing) What had occurred in the meantime?

A. On December 4, the Oakland mail order house and retail store were picketed.

Q. Did you have occasion to call Mr. White back on or about Thursday, the 28th?

A. Yes, I did.

Q. What did you tell Mr. White at that time?

A. I told Mr. White that the closed shop provisions which had been submitted to the company were not acceptable, and that the company's position had not changed. [620]

Q. What did Mr. White say at that time?

A. At that time, he said that he wanted to confer with other union leaders, and he would call me back that afternoon.

Q. Did you receive any call from Mr. White

(Testimony of W. P. Powell.)

prior to the time that you had your next meeting with him? A. No, I did not.

Q. What was the date on which the open house and store were picketed? A. December 4.

Q. Referring to Respondent's Exhibit 20, I call your attention to the last paragraph on the first page, in which you ask about some action that might be taken in the event the pickets were placed around the Oakland plant. Let me ask you whether the action was ever taken in accordance with your recommendation in that letter?

Mr. Walker: Just a minute. Will you read that question back?

Trial Examiner Bokst: Read it back, Mr. Nelson.

(Thereupon the pending question was read aloud by the reporter as above recorded.)

A. No, it was not.

Mr. Walker: Just a moment. I object to the question in form, including facts not in evidence. The instrument itself indicates the purpose, or the instrument indicates what the situation was that obtained at that time.

Trial Examiner Bokst: Of course, it is purely a collateral matter, going into the situation at the Oakland store, with which I am not concerned. As I understand Mr. Ball's position, he wants to clear up the record inasmuch as the letter is already in evidence, to show whether any action was taken in accordance with the recommendation.

(Testimony of W. P. Powell.)

Mr. Walker: I understand that, Mr. Examiner, but counsel, in framing his question, interjected a phrase that the inquiry in the letter referred to the Oakland plant, when, as a matter of fact, it seemed to be directed to the situation at the Portland plant.

Mr. Ball: It may be. Let the question be modified so that the witness could tell us whether or not any such action, as is suggested in that letter, was taken at Portland or Oakland or anywhere else.

Trial Examiner Bokat: All right.

A. So far as I know, no.

Q. (Mr. Ball, continuing) Do you recall why it was not taken?

Mr. Walker: That is immaterial.

Trial Examiner Bokat: Yes, he said it was not taken.

Mr. Ball: I offer to prove by this witness on direct examination that he was instructed not to take that action by the management in Chicago.

Mr. Walker: I have no objection to that.

Trial Examiner Bokat: If that is a fact. Are you willing to stipulate that the witness would so testify? [622]

Mr. Walker: Just exactly what counsel stated.

Q. (Mr. Ball, continuing) Do you recall meeting with Mr. White in Oakland in the company of Mr. John Barr?

A. Yes, I do.

Q. Do you recall when the meeting took place?

A. Well, there was more than one meeting.

(Testimony of W. P. Powell.)

Q. Well, when was the first meeting?

A. The first meeting was December 11.

Q. Do you recall whether any question arose at that meeting as to the extent of Mr. White's authority?

A. I don't think there was any question at that meeting; in fact, I know there was not.

Mr. Walker: May I ask that the record show that, with regard to the prior question asked the witness, I desire to request that he be directed to answer the question "yes" or "no".

Mr. Ball: I will withdraw the question. The answer may be stricken, if there was one.

Trial Examiner Bokat: All right.

Mr. Ball: At this time, I desire to re-offer Respondent's Exhibit No. 1.

Mr. Walker: To which I interpose the same objection as was made at the time of the original offer.

Trial Examiner Bokat: I am ready to rule. This paper appears to be the official paper or publication of the American Federation of Labor. [623]

There is no dispute about that?

Mr. Walker: No.

Trial Examiner Bokat: I will let it go in as proof of the fact that such an issue appeared containing the story. I am not accepting it as being the fact of everything contained therein. What influence the story had on the respondent is something else. I will say, with that limitation, I will

(Testimony of W. P. Powell.)

accept it in evidence, that is, that on that particular day, an official publication of the American Federation of Labor issued, and in that particular issue, that article appeared directed against Montgomery Ward; but I will not accept it as proof of the facts stated in the story.

With that modification, I accept it in evidence as Respondent's Exhibit No. 1.

(Whereupon the document heretofore marked as Respondent's Exhibit No. 1 for identification was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

American Labor Citizen

San Francisco, Friday, November 29, 1940

Move on Montgomery Ward

Deadline All Set

For Concerted Action

Against Unfair Company

Every Point of Operation

In Eleven Western States

To Feel Economic Pressure

Warehousemen, Clerks

and Teamsters All Set

for Drive Against

Anti-Labor Activities of

National Chain Store

(See Page 4)

San Francisco.—Deadline today! Montgomery Ward, national chain store labor-resisting corpora-

(Testimony of W. P. Powell.)

tion, if it continues its stalling tactics and refuses recognition of the unions in legitimate organizational effort, will feel the economic weight of the combined forces of the teamsters, warehousemen and retail clerks in every point of its operation in the eleven western states.

Teamster and clerk units in northern California have already moved against the company at Redding, Denver, Colo., Portland, Ore., and other points in the West are poised and ready to act against the company.

Complete Zero

Repeated conferences between a special committee of warehousemen, teamsters and retail clerks, representing all the units in the West, and the company officials have netted a complete zero, enhanced by empty phrases and wordy, meaningless conversation. Either the labor relation employes of the company have no power to give a final answer or they are following the usual stalling and procrastinating policy of the company throughout its entire operation.

T. A. White, secretary of the Western Warehouse Council, has been delegated by the committee to represent it with full power to act. One last conference is being held between White and the management of Montgomery Ward. Should this conference fail, as it is expected to, White will set the teletype into action and concerted movement will

(Testimony of W. P. Powell.)

take place against the company throughout its entire operation in the eleven western states.

Refuses Agreements

Despite clerk and warehousemen's majorities in many cities the company refuses to negotiate agreements. Company unions are fostered in some spots. Union organizing is generally discouraged in every locality where there is a Montgomery Ward store. The entire policy of the company is labor-resisting despite the fact that the bulk of the company's custom comes from the ranks of organized workers.

Another point of issue is the insistence of Montgomery Ward in handling nationally boycotted goods despite continual appeals by various unions not to do so. Particular case is their handling of Dixie Foundry Company of Cleveland, Tenn., stoves. The unions have succeeded in getting all retail establishments in the country to cease selling this boycotted merchandise and Montgomery Ward is the only influence that keeps the union from signing the unfair manufacturer.

"Montgomery Ward," Ted White said, "has been playing at merry-go-round with the warehousemen and clerks in their various cities. Heretofore they have been confronted with individual locals operating as separate units in their various jurisdictions. The whole history of the company in its labor relations has been very bad. So bad in fact that the AFL units of warehousemen, clerks and teamsters

(Testimony of W. P. Powell.)

were compelled to coordinate their efforts all over the West.

“No longer will these powerful national chain organizations be allowed to bully small local unions and hinder their legitimate efforts to organize. This is an issue that concerns us all in every point of operation and we intend to see it through to the finish.”

In addition to the direct economic action taken by the AFL affiliates in the West a publicity campaign urging all union members and their friends not to patronize this unfair firm is being instituted throughout the territory.

Special Flash!

Redding, Cal.—First shot fired here in huge eleven western states campaign against labor-resisting Montgomery Ward.

Anticipating further stalling and procrastination on the part of Montgomery Ward officials, George Salvo, secretary of Teamsters Union Local 137 here, announced strike, boycott and picket action in this city against both the Montgomery Ward warehouse and the Montgomery Ward retail store.

The warehouse serves the entire northern territory here up to the Oregon line. The men, loyal to the union, have left the plant, the teamsters are not hauling the labor-resisting chain store company's merchandise.

(Testimony of W. P. Powell.)

The retail clerks, Secretary William Weeks announced, have thrown a picket line around the company's retail store here.

Action took place at noon on Tuesday of this week and resulted from the company officials wilfully ignoring a time limit ultimatum.

"If the Montgomery Ward attitude in this Redding instance is an indication of the company's policy to be expressed at the Friday meeting in San Francisco, the joint union committee economic action in the eleven western states is inevitable," salvo said.

To Every Member and Friend of Organized Labor
in the Eleven Western States!

For the Preservation of the Very Principles and
Ideals of Organized Labor, It Is Important
That You

Do Not Patronize

Montgomery Ward

This National Chain Store Company Is Combatting
Legitimate Organizations in Practically Every
One of its Operations in the Entire West!

They refuse to recognize majorities of clerks or warehousemen.

They refuse to seriously discuss these majorities and decently negotiate with union official.

(Testimony of W. P. Powell.)

They are sanctioning "company unions" in many points of operation.

They discourage unionization among their employees.

They refuse to sign unionized contracts.

They refuse to officially notify their employees that they may join a union if they wish to.

Their entire labor relations policy is one of conciliatory delay, thereby giving positive evidence that they do not want unionization.

They handle nationally boycotted unfair merchandise, despite the fact that they have been repeatedly requested to cooperate with union workers who make up the bulk of their customers.

AFL warehousemen, teamsters, retail clerks, engineers and machinists are about to take action against this labor-biased unfair firm throughout its entire operation in the eleven western states.

Nearly every point of operation in the territory reports difficulty with this concern. Reports of this nature are at hand from Portland, Oregon; Tacoma, Washington; Los Angeles, Oakland, Fresno, Modesto, Redding, Santa Rosa, Petaluma, Marysville, Pittsburg and other California cities; from Denver, Colorado; from Nampa, Idaho, and elsewhere.

In justice to your fellow workers and for the preservation of your own union principles you

Must Not Patronize This Unfair Firm!

(Testimony of W. P. Powell.)

Q. (Mr. Ball, continuing) Now, do you recall a meeting, together with Mr. John Barr, and Mr. White, held in Oakland, at which meeting Mr. White inquired as to the existence of grievances; or, Mr. Barr inquired as to grievances?

Mr. Walker: I will object to that. I will object to that unless counsel fixes the time and the persons present.

Mr. Ball: I have fixed the persons present.

Mr. Walker: The time.

Q. (Mr. Ball, continuing) Will you in describing any such meeting, [624] fix the time and persons present?

Trial Examiner Bokar: All right.

A. At the meeting of December 11, attended by Mr. White, Mr. Hoskins, who is a Federal Conciliator, Mr. Barr and myself, the question of grievances was raised.

Q. What, if anything, did Mr. White say with respect to the existence of grievances?

Mr. Walker: I don't understand the materiality of this question of grievances arising. Certainly there is no allegation to the effect that Local 206 of the Retail Clerks has made any issue with respect to grievances in this proceeding.

A. Well, Mr. White said there were no complaints or grievances with regard to wages or the hours which the company had established.

Q. (Mr. Ball, continuing) And what did he state the issue was?

(Testimony of W. P. Powell.)

A. He said that the unions were interested in the closed shop and were insisting that the company agree to a closed shop.

Q. Mr. Powell, were you present when Mr. Estabrook testified in this case? A. I was.

Q. Do you recall that Mr. Estabrook asked you if you had the power to negotiate an agreement, and that you said, "I don't know; I guess so, that the Board of Directors would have to sign it." I will ask you if you made any statement of that kind whatsoever, and if so, what it was? [625]

A. No such statement was made to Mr. Estabrook.

Q. What is the fact as to whether or not the Board of Directors would have to sign any agreement?

A. So far as I know, I don't think that they would.

Q. You have never been so instructed?

A. That is right; I have never been so instructed, and I never so stated. I might state that Mr. Estabrook did ask that question, and I told him I had authority to negotiate with him. But I didn't say, "I don't know; I guess so".

Trial Examiner Bokar: Did he ask you whether you had authority to sign a contract, or who had authority to sign a contract?

The Witness: That question was raised, and I

(Testimony of W. P. Powell.)

don't recall if Mr. Estabrook was the person who put the question to me.

Trial Examiner Bokat: Regardless of who put it to you, what was your reply, if any?

The Witness: That I told him,—I told him that I would not sign the contract, but that the Local Manager would be the one to sign the contract. Rather, I will put it this way: I told him that I didn't believe I would sign the contract, but I thought the local manager would be the one to sign the contract.

Q. (Mr. Ball, continuing) Do you recall off-hand at what meeting the question and answer occurred?

Trial Examiner Bokat: I don't think that makes any difference. [626]

The Witness: In fact, I am sure it was at the meetings of December 14 or 16; either one of them.

Trial Examiner Bokat: All right.

Q. (Mr. Ball, continuing) Were you present in the court room when Mr. Holmes testified in this case? A. Yes, I was.

Q. Do you recall if Mr. Holmes testified that at the meeting of November 25, Mr. White asked you who had the power to execute an agreement, if such was reached, and you answered that the Board of Directors would sign the agreement? Now, in fact, was any such question put to you by Mr. White, and did you make such an answer?

(Testimony of W. P. Powell.)

A. Such a question was put to me, but I did not make that answer.

Q. What answer did you make at that meeting?

A. I said that I was not sure who would sign an agreement, that I didn't think it would be me, and it was my opinion that it would be the local manager. I pointed out that the question had not been reached in our negotiations.

Q. In connection with the meeting, or one of the meetings to which Mr. Holmes testified, he stated that you were asked whether the wage scale which you had listed in connection with the Warehousemen's proposed contract was the wage scale that was being paid, and you said that in some cases it was less. Did you make any such statement to the effect that in some [627] cases it was less, to Mr. Holmes, or at that meeting, or at any time?

A. No, I did not.

Q. What, in fact, was the statement you made about wages, or the figures that you mentioned in connection with the discussion of wage scales submitted in the Warehousemen's contract?

A. At that meeting of November 12 with Mr. Estabrook and Mr. Holmes, when we reached the section covering wages, I stated that the company could not agree to the demands which they had presented in their proposal, and Mr. Estabrook asked what wages we could agree to, and I read off to him for each classification listed a minimum hourly rate

(Testimony of W. P. Powell.)

which would be acceptable to the company as a matter of agreement.

Q. And did you say that was less than was being paid?

A. No; I said that was the minimum, and, in many cases,—a great many cases,—the hourly rate was higher.

Trial Examiner Bokat: Let me see if I understand that answer clearly. Are you referring to the scale of wages then being paid at the Portland Store?

The Witness: In answer to that last question, yes. That is, the hourly rates which I read to Mr. Estabrook were those wages which would be acceptable to the company, as a matter of agreement.

Trial Examiner Bokat: But they represented minimum rates on [628] the whole that were then being paid to the Warehousemen then in your Portland store?

The Witness: That is true.

Trial Examiner Bokat: All right.

Q. (Mr. Ball, continuing) Do you recall of Mr. Holmes testifying that at the meeting of December 16, Mr. Estabrook asked you if you would sign, or the company would sign, an agreement with the same wages, hours and working conditions as has been in effect prior to the strike; and that you said "no"? [628A]

What is the fact as to whether or not that question and answer were made?

(Testimony of W. P. Powell.)

Trial Examiner Bokat: Will you read the question back, Mr. Nelson?

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. That question was not asked by Mr. Estabrook.

Q. Was that question asked by anyone else at that meeting? A. Yes, it was.

Q. What occurred at that time?

A. The question was asked by Mr. Allen, and I said to him that the question as to the signing of an agreement was one which had not been reached in our negotiations thus far, and therefore, I felt it was premature.

At that point, Mr. Denecke asked Mr. Allen if the unions would be willing to accept such a proposal, and Mr. Allen said "no", and I said to Mr. Allen, "Well, then, isn't your question a hypothetical one?" And he said, "yes". And I suggested that it would not be advisable or would not accomplish anything to discuss a hypothetical question.

Q. Were you present when Mr. Dixon testified in this case? A. Yes.

Q. Do you recall that he testified that on the meeting of September 19, he asked you whether, if an agreement were reached with his union, you were in a position to sign a [629] contract or an agreement, and you said to him that the company did not sign agreements. Now, was that question asked, and, did you make such an answer?

(Testimony of W. P. Powell.)

A. Such a question was asked, but I did not give that answer.

Q. What answer did you give?

A. I said, so far as I knew at that time, I didn't know of any contract in existence between the company and labor organizations.

Q. Did you at any time during the course of the negotiations with relation to the Portland retail and mail order house, make any statement that the company would not sign a written contract?

A. No, I did not.

Q. During the fall of 1940, was your time exclusively employed in labor relations?

A. No, it was not.

Q. What is the fact as to whether or not you were busy during that time?

A. I was very busy.

Q. And were you or were you not located during most of that time in Oakland?

Mr. Walker: I don't see the materiality of this, whether he was busy or not, or whether he was leisurely occupied. It certainly has no bearing on any of the issues.

Trial Examiner Bokat: I understand. It may have something to do with the statement of the Board's witnesses about their [630] inability to get in touch with Mr. Powell.

Mr. Ball: That is it.

Trial Examiner Bokat: All right.

A. I was traveling up and down the Coast quite

(Testimony of W. P. Powell.)

a bit of the time, but the majority of my time was spent in Oakland.

Q. (Mr. Ball, continuing) Did Mr. Estabrook at any time ask you whether the Company would sign an open shop contract with the status quo?

A. No.

Q. Did anybody ask you about signing an open shop contract?

A. It was not asked in that language.

Q. What kind of a question, or what question of similar import was asked, and by whom?

A. Mr. Landye at the meeting of December 13 asked this: as to whether or not, if the closed shop provision were removed from the Warehousemen's proposal, would the company agree to the remaining provisions.

Q. And what did you say?

A. I said that the company had substantial objections to certain other provisions and therefore could not agree to all the remaining provisions.

Trial Examiner Bokst: Off the record.

(Discussion off the record)

(Thereupon a document was marked as Respondent's Exhibit 25 for identification.) [631]

Mr. Ball: I offer in evidence Respondent's Exhibit 25, being a clipping from the San Francisco Chronicle, December 22, for the purpose of showing the newspaper publicity and the background of the discussions that occurred at that time.

(Testimony of W. P. Powell.)

Trial Examiner Bokar: I stated off the record that I would accept it merely as evidence of the fact that this particular article came to the attention of the respondent, and not as proof of the facts contained therein.

(Whereupon the document heretofore marked as Respondent's Exhibit 25 for identification was received in evidence.)

San Francisco Chronicle

Dec. 2, 1940

AFL WILL MAP CHAIN STORE PLANS

Plans for obtaining labor agreements in Montgomery Ward stores in 11 Western States will be mapped at a Los Angeles meeting today of officials of the AFL.

The meeting will be held at the offices of the Joint Council of Teamsters. Dave Beck, vice president of the International Brotherhood of Teamsters, is expected to attend.

Chairman of the co-ordinating committee of the unions involved is T. A. White, AFL warehouse leader. AFL officials claim the company has refused to discuss labor relations with the union "despite union majorities in many stores."

Q. (Mr. Ball, continuing) Do you recall, Mr. Powell, having a meeting in Oakland on December

(Testimony of W. P. Powell.)

6, at which time you discussed the situation at Portland with Mr. White? A. Yes.

Q. And what was Mr. White's statement about action at Portland during that meeting?

A. Mr. White said this, that he felt that we were making some progress in our negotiations at Oakland, and that as long as our negotiations progressed satisfactorily, he would see that no action was taken at Portland. He said he would communicate with Mr. Estabrook and instruct him to withhold any contemplated action in Portland. Mr. White gave that assurance to myself and to the Federal Conciliator, Mr. Hoskins.

Q. What is the fact as to whether or not the Portland house was [632] then closed, or was struck on the following day, December 7?

Trial Examiner Bokar: It is so stipulated.

Q. (Mr. Ball, continuing) Did you meet again with Mr. White on the following day, December 7?

A. Yes, we did.

Q. And what explanation did he give of the fact that the Portland house had been struck that morning?

A. Mr. White said that the Portland house had been struck by the Retail Clerks; that he had had authority to act for the Retail Clerks, but he no longer had that authority, and that the action which had been taken was out of his control.

Mr. Ball: Your witness.

Trial Examiner Bokar: Mr. Ball, in order to

(Testimony of W. P. Powell.)

clarify the record, I understand that you are not going to question this witness concerning other meetings, because this witness' testimony as to what took place, as stated therein, would be substantially the same, or exactly the same as it is reported to Mr. Barr, and, for the purpose of saving time, you are not asking him to testify orally to that?

Mr. Ball: That is right.

I will state that, if the specific questions were asked him on direct examination, he would testify substantially as is stated in the exhibit.

Trial Examiner Bokar: And the things stated therein did take place, as so reported? [633]

Mr. Ball: Yes, and that the article states what took place at those meetings.

Trial Examiner Bokar: All right, you may cross examine.

Cross Examination

Q. (Mr. Walker) Mr. Powell, since September, 1938, you have undertaken labor relations for Montgomery Ward?

A. No, I wouldn't say; but I said I have been familiar with the labor relations problems of the company since that time.

Q. What do you mean by that?

A. The question was asked, and I was just repeating the question, or the answer to the question I gave.

Q. Well, how do you mean? In what sense had

(Testimony of W. P. Powell.)

you become familiar with them? In an official capacity?

A. Well, I will answer your question this way, that I was not at that time taking an active part in collective bargaining with representatives of our employees.

Q. I understand that. Have you, affirmatively; in what manner did you become familiar with the labor relations of Montgomery Ward?

A. I don't believe that I understand your question.

Mr. Ball: I suggest that you simply ask Mr. Powell something about the first problems that he handled in labor relations for Ward's, the course of his experience in those matters, and so on.

Trial Examiner Bokat: I don't think that it is necessary [634] to go into all that.

Mr. Walker: No.

Trial Examiner Bokat: I assume that you learned by discussions with other officials, rumor and hearsay, something of the problems of the company with regard to its labor relations with its employees; is that correct?

The Witness: Yes.

Trial Examiner Bokat: Is that satisfactory?

Mr. Walker: That is satisfactory.

Trial Examiner Bokat: All right.

Q. (Mr. Walker, continuing) And since that time, and particularly since August, 1940, you have

(Testimony of W. P. Powell.)

actively undertaken matters relating to labor relations?

A. I took an active part prior to that time, but that was the date I came to the Coast.

Q. During all the time you have taken an active part, you have, in the meantime, acquired considerable experience, have you not?

A. I have acquired some experience, yes.

Q. In your official capacity, you have had occasion to converse with Mr. Barr,—John A. Barr?

A. Yes.

Q. You have met him and made contact with other officials of the company with relation to labor relations problems, and, during the course of your experience, have become familiar with [635] the philosophy or theory or attitude or policy of the company relative to labor relations; have you?

A. That is correct.

Q. All right, let us call it “philosophy” so that we may understand.

A. You can call it anything you want to call it.

Trial Examiner Bokar: As long as we understand it.

Mr. Walker: That is right, as long as we understand it.

Trial Examiner Bokar: All right.

Q. (Mr. Walker, continuing) And the philosophy expressed by Mr. Barr has been transmitted to you by way of instructions from him, is that correct?

A. That is correct.

Q. And upon receipt of those instructions, have

(Testimony of W. P. Powell.)

you endeavored to transmit them into action whenever you have had occasion to meet with representatives of organized labor; is that correct?

A. I have endeavored to follow Mr. Barr's instructions.

Q. Now, I gather from your testimony,—in the event I have misunderstood you, I wish that you would correct me,—it has been your practice in meeting with representatives of organized labor, particularly concerning the Portland situation, to receive proposed written agreements from labor organizations?

A. I wouldn't say that has been our practice. I would say that is the way the majority of the bargaining sessions were [636] conducted.

Q. Well, in short, if a proposed contract is delivered to you, you accept it as such, do you not?

Mr. Ball: Do you mean accept the contract, or accept it as a basis of bargaining?

Mr. Walker: As a proposed contract.

A. Do you mean, are we willing to go into negotiations with respect to that contract?

Q. (Mr. Walker) I mean, you accept the receipt or accept the delivery of the proposed contract? Naturally, that is the first thing that happens?

Mr. Ball: You mean, he does not accept the contract as such?

A. If a proposal is received, I accept the receipt of it, yes.

Q. (Mr. Walker, continuing) So that we will

(Testimony of W. P. Powell.)

Understand it, I am not attempting to put any questions to you for the purpose of confusing you or misleading you. A. I understand.

Q. I am simply asking you questions in order that I may have a more thorough understanding of your testimony. A. All right.

Q. Now, after the form of agreement has been received by you, a meeting is arranged for; is that correct? A. Yes.

Q. And at that meeting, if the representatives of the Union [637] suggest, the contract is then discussed, clause by clause?

A. Yes, that has been done.

Q. It is your instruction not to agree upon any clause? A. No; that is wrong.

Q. Well, will you straighten me out on that?

A. How do you want to be straightened out?

Q. I don't know.

A. Well, I don't know either.

Q. Well, wherein is my statement wrong?

A. You stated that your understanding of my instructions was that I should not agree with any clause.

Q. As such?

A. Well, now, I am not sure I understand your question.

Mr. Walker: Out of the ambiguity of words.

Mr. Ball: We have an exhibit in here which contains Mr. Barr's instructions, and I think we will

(Testimony of W. P. Powell.)

agree that Mr. Powell received them and carried them out.

Trial Examiner Bokat: There is no doubt about his receiving them, and he has testified that he carried out the instructions.

Mr. Ball: I don't want to interrupt. I thought it might shorten things.

Q. (Mr. Walker, continuing) I call your attention to paragraph 3 of the second page of the letter dated November 22, written by John A. Barr, received in evidence as Respondent's Exhibit No. 18. Do you see that? [638]

A. Yes.

Q. Will you read it?

A. I don't think I need to.

Q. Well, let us refer specifically to this statement there: "But do not agree to such a clause."

A. I think I understand your question now.

Q. All right, will you answer it?

A. You are referring to Mr. Barr's testimony in which he stated that agreement to a contract is an agreement in its entirety.

Q. Now, by withholding agreement to any one clause, will you explain how it is possible to arrive at a collective bargaining agreement?

A. Why, yes. I might illustrate, to use your question: if, say, there are ten provisions of a proposal and I withhold agreement as to five of those provisions, agreement might be reached on the other five.

(Testimony of W. P. Powell.)

Q. How?

A. Isn't it possible to reach an agreement on the other five provisions?

Q. That is what I wanted to know.

A. If the parties so desired.

Q. That is what I wanted to know, how it is possible when you don't agree to such clauses: "In discussing individual clauses, do not agree to such clauses." How is it possible?

A. Well, I have stated to you how it is possible. If the Company objects to certain provisions of a proposal, and does [639] not object to the others, certainly it seems possible that an agreement can be reached on those to which the company does not object. I believe you understand Mr. Barr's point there.

Q. I am frank to say I don't, and that is why I asked you to explain.

A. The reason an objection is made, or not objection is made to a particular provision rather than that we agree to that provision is that, during the course of negotiations as we come upon later sections of a particular proposal, the discussion might take such a turn which would lead the negotiator to change his position on a previous provision which had been discussed.

Q. Well, now, let us go back to the word "agreement". If you agreed to that particular clause, then that clause must apparently be acceptable to the union or they would not have advanced it, isn't that correct?

A. I presume so.

(Testimony of W. P. Powell.)

Mr. Ball: I will object to that because it assumes a fact which is not in evidence, because the union might propose a number of clauses to which they do not object, that is, if written into the contract as a whole, as proposed, and yet they might object to signing a contract containing those particular clauses and not the others.

Q. (Mr. Walker, continuing) Was the statement of counsel a fact? [640]

Trial Examiner Bokat: Do you agree to that?

Mr. Ball: They may accept certain clauses in a contract but would not be willing to accept just those clauses in a contract as a final contract, without the others.

Mr. Walker: That is what I had in mind. Do you understand it that way?

The Witness. Yes.

Q. (Mr. Walker, continuing) Now, how do you expect a contract to be reached with a labor organization by agreeing with only five submitted clauses out of the ten, as you expressed it?

A. How do I expect it?

Q. Yes.

A. My opinion is that it could be done.

Q. Oh.

A. You are asking for my opinion.

Q. In other words, it is within the realm of possibility?

A. You are asking how I expect it could be done; in other words, I expect it could be done.

(Testimony of W. P. Powell.)

Mr. Ball. I will object to that question, if it is within the realm of possibility.

Trial Examiner Bokat: That is obvious.

The Witness: I would say it was within the realm of probability.

Trial Examiner Bokat: I don't want to get into the realm of metaphysics. [641]

Mr. Ball: I was afraid we were, and that is why I interjected my objection.

Q. (Mr. Walker, continuing) You have been instructed not to take the initiative in bargaining, is that correct?

A. Yes, that is correct. I have been instructed that the company has no demands to make upon a labor organization, and therefore we have no reason to go to them with any requests.

Q. In other words, the duty lies with the union to keep coming back and keep coming back and keep submitting proposals to the company?

Mr. Ball: I will object to the use of the word "duty". As I observe, that involves another of these metaphysical distinctions.

Trial Examiner Bokat: Well, ask him the question with the omission of the word "duty". Suppose you use the word "burden", if that is acceptable.

Mr. Walker: That is all right.

Trial Examiner Bokat: If you want to use the word "burden", that the burden was upon the company to come back with proposals—that the burden

(Testimony of W. P. Powell.)

was upon the union to come back with proposals, perhaps that would be better.

Mr. Walker: All right.

Trial Examiner Bokat: All right. Off the record.

(Discussion off the record.)

Mr. Walker: Do you understand the question now? [642]

The Witness: Will you repeat it, please?

Trial Examiner Bokat: I suggest that you reframe it. You conceive it to be the burden of the Union to keep submitting demands until they meet with the approval of the company?

Mr. Ball: Let me interpose an objection even to the word "burden". I don't know whether it is a burden or whether it is not a burden. It is something that I assume would be voluntarily assumed as such.

Trial Examiner Bokat: I am just trying to carry out Mr. Walker's idea.

Mr. Ball: May I suggest that we inquire whether Mr. Powell's concept of the ordinary processes of bargaining would be that a union would present demands and then reframe them until the situation was clarified.

Trial Examiner Bokat: I assume that is your position. Is that correct, as stated by Mr. Ball?

The Witness: That is the process of bargaining as stated which has been followed here in Portland, yes.

Trial Examiner Bokat: In other words, as I

(Testimony of W. P. Powell.)

see it, Mr. Powell, you have proceeded on the theory, so far as you are concerned, if you reject a particular proposal, that ends the matter until and unless the Union submits some modification of that proposal to be considered anew by you?

The Witness: I wouldn't say that is entirely correct. [643]

Trial Examiner Bokar: Well, in what way is it not entirely correct?

The Witness: I would say that there are certain provisions of proposals which have been submitted to which the company has a substantial objection, such as a closed shop, to which I cannot conceive of any modification which the union could come forward to present. There are other provisions where it is a question of wording, and that wording has been suggested during the course of the bargaining sessions.

Trial Examiner Bokar: You might state that the company would accept those particular provisions, or, let us confine it to one provision, would accept that particular provision with elimination of a certain word, or have it reworded in a particular way, such as suggested; is that what you mean?

The Witness: It has been stated in a number of ways, that any provisions, if it is worded thus and so, it would be acceptable to the company.

Mr. Ball: Let me submit that the story of the bargaining sessions shows that that has been done.

(Testimony of W. P. Powell.)

Trial Examiner Bokat: Very well, Mr. Ball. Particularly in the testimony of Mr. Langford.

Q. (Mr. Walker, continuing) On any of the clauses, or on any of the agreements submitted by any of the unions to the company, did you express to the representatives of the Union the position of the company in any manner other than as a restatement of [644] position concerning wages, hours and working conditions as had been pertaining?

A. I am afraid I will have to have that question read. It is rather long.

(Thereupon the question was read aloud by the reporter as hereinabove recorded.)

A. I would have to know what specific provisions you are talking about.

Q. All right, we will do that.

Trial Examiner Bokat: Off the record.

(Discussion off the record.)

A. There were not any concessions of major importance; there were, I would say, some minor concessions.

Q. Who first gave you a copy of the Warehousemen's proposed contract or agreement?

A. I received a copy from Mr. Huddleston in the mail.

Mr. Ball: We can stipulate the date in a minute.

Q. (Mr. Walker, continuing) Did you later receive one personally from the Warehousemen's representative?

A. No. When I came up to Portland to meet

(Testimony of W. P. Powell.)

with the union representatives, Mr. Estabrook and Mr. Holmes, I obtained from Mr. Huddleston the copy that he had received from Mr. Estabrook, which we used as the working copy.

Mr. Ball: I will stipulate the date if you want to, on that.

Q. (Mr. Walker, continuing) Now, in the meetings in December [645] in Portland, either Mr. Estabrook or Mr. Holmes made some statement to the effect that they were willing to recede from an absolute insistence on a closed shop provision appearing in any contract, isn't that correct?

A. No, they did not. Mr. Estabrook in the meeting of December 16, when we opened that meeting, suggested that we go through the Warehousemen's proposal section by section. I pointed out to Mr. Estabrook that we had gone through the Warehousemen's proposal before, and I was wondering if his union's position on the closed shop was still the same.

I said, if it was, I wondered as to the advisability of discussing the remaining provisions, and Mr. Estabrook said that he would not withdraw the closed shop demand; in fact, he could not. He said that the only way that the closed shop demand could be withdrawn would be by a vote of the membership, and when I asked him if that was a possibility, he said it was; he said that the membership might at some later date vote to withdraw the demands for a closed shop.

(Testimony of W. P. Powell.)

Q. Didn't they indicate to you that through the process of bargaining the Warehousemen were not insisting on a closed shop? A. No.

Q. Have you any memoranda on your meetings with Mr. White? A. Yes, I do.

Q. Here with you?

A. No, I don't have them here with me. [646]

Q. Where are they?

A. They are in Oakland. You see, the meetings with Mr. White all were in Oakland.

Mr. Ball: Off the record?

Trial Examiner Bokat: Off the record.

(Discussion off the record.)

Q. (Mr. Walker, continuing) Mr. Powell, in your answer concerning whether or not you had authority to sign an agreement, you seemed a little uncertain as to who would have that authority. Do you know?

A. I can explain that, Mr. Walker. That point had not been reached in any particular negotiations, either here in Portland or for that matter, anywhere on the Coast; and, by that, I mean the question as to *would* sign a contract on behalf of the company, that question had not been reached; in fact, it had not been approached in the negotiations, and that was the reason for my hesitancy in saying exactly who, because that question would be decided at the time it was reached in the negotiations.

I said I presumed it would be the local manager.

Q. The unions, however, did want to know

(Testimony of W. P. Powell.)

whether they were dealing with anybody with whom they could ultimately reach an agreement, isn't that correct?

Mr. Ball: I object to the union's belief about these matters, and the relevancy of that belief. [647]

Mr. Walker: I am not asking about the Union's belief; I am asking about his belief.

Trial Examiner Bokat: I think you have gone into it, have you not, Mr. Walker?

Mr. Walker: As a matter of fact, that question has never been decided yet, has it?

The Witness: What is the question?

Mr. Walker: Who would sign a contract.

A. So far as the Portland situation is concerned, no; to my knowledge, it has not been decided.

Q. (Mr. Walker, continuing) I call your attention to your testimony in which you told Mr. Allen it was premature to determine whether an agreement could be reached which embodied working conditions, wages and hours obtaining at the plant prior to the strike. Will you explain a situation in which such a question is premature?

A. Well, in answer to Ar. Allen's question, I used the word "premature" with regard to signing a contract, because, in his question, he asked if the company would sign a contract covering those matters, and I pointed out that the question of the signing of a form of contract was premature at that time, and we felt that unless an agreement had been reached between the parties on substan-

(Testimony of W. P. Powell.)

tially all the provisions, or upon a substantial number of provisions, then was the time to consider the question as to the form of the agreement. [648]

Q. An agreement over hours, wages and working conditions then obtaining at the operations, wouldn't you say that was substantial?

A. Well, there was no agreement on this point, or on those practices. As I stated, Mr. Allen said the question was a hypothetical one.

Q. Did you report that matter to Mr. Barr?

A. I reported that meeting.

Q. Mr. Powell, who makes the quarterly "wage survey" that you have described?

A. The personnel manager.

Q. And does that cover anything other than those employees engaged at the Portland operation?

A. Well, it is a practice that is done throughout the country and here at Portland; it covers only, in this instance, the employees at Portland. Is that what you mean?

Q. Does it cover any other factors other than the wages of employees at Portland?

A. What do you mean by "other factors"?

Trial Examiner Bokar: Does it cover salaries paid by other concerns, by concerns doing business similar to that of Montgomery Ward?"

The Witness: Yes, and I believe I stated that.

Trial Examiner Bokar. I don't know whether Mr. Walker intended that, but that is what I want to know. [649]

(Testimony of W. P. Powell.)

Mr. Walker: That is precisely what I intended.

Trial Examiner Bokat: All right. You say it does?

The Witness: Yes.

Q. (Mr. Walker) Who makes the surveys of the other firms operating in the Portland area?

A. As I understand the survey,—and that is what is told to me by Mr. Glassley, who explained the procedure to me,—there is an interchange of correspondence between employers, which enables employers to know what rates are established at various business houses and establishments in Portland, and it is done to compare rates on comparable jobs.

Q. For instance, relative to the warehousing at Montgomery Ward, a survey is made of the wages paid by other warehousing firms in Portland, is that correct?

A. That is correct.

Mr. Walker: I believe that is all.

Trial Examiner Bokat: Do you have those figures, Mr. Powell.

The Witness: Yes, I have them, but not here.

Trial Examiner Bokat: Did you have those figures before you at the time that you went into negotiations with the Warehousemen's Union, or before you went into the negotiations?

The Witness: I looked at them before we entered into the negotiations.

Trial Examiner Bokat: But after you had seen the proposed contract? [650]

(Testimony of W. P. Powell.)

The Witness: Yes, after I had seen the proposed contract, and before we entered into the negotiations.

Trial Examiner Bokat: You had examined the survey?

The Witness: Yes.

Trial Examiner Bokat: What did you find?

The Witness: Well,—

Trial Examiner Bokat: Of course, I realize that you haven't the figures here and you will have to depend on your recollection.

The Witness: Mr. Glassley pointed out the comparisons in wage rates to me.

Trial Examiner Bokat: I am referring now to the Warehousemen for example.

The Witness: I don't recall the Warehousemen specifically.

Trial Examiner Bokat: What have you in mind, now?

The Witness: The entire personnel of the mail order house on job classifications. That is the way the survey was taken. The rates are listed as to all job classifications.

Mr. Ball: Let me point out to say that our job classifications are not analogous to the certification classification of the Warehousemen's Union, Mr. Examiner.

Trial Examiner Bokat: I just wanted to know if Mr. Glassley knew what wage scales were paid to other employees in similar classifications, regardless of what they are called.

(Testimony of W. P. Powell.)

The Witness: I largely relied on Mr. Glassley.

Trial Examiner Bokat: There is no question about that. And [651] he assured you what?

A. He assured me that the company wage policy was being followed.

Trial Examiner Bokat: You mean he assured you that the company was paying as high wages as other concerns in Portland, Oregon, or in the Portland area?

The Witness: He gave me that assurance, and he illustrated that by,—

Trial Examiner Bokat: Giving you some examples?

The Witness: Yes.

Trial Examiner Bokat: All right.

Q. (Mr. Walker, continuing) What examples did he show you? Did he refer to the mail order section?

A. That is right.

Q. And did that include Warehousemen?

A. Yes, it did.

Q. What do you recall now was the showing relative to warehousemen?

A. I don't recall specifically.

Q. Well, was your rate on warehousemen the same as other firms were paying for warehousemen in Portland, or better or less?

A. As I recall, it was either equal or better.

Trial Examiner Bokat: There was some dispute about that during the bargaining negotiations, whether or not that was a fact? [652]

(Testimony of W. P. Powell.)

The Witness: Yes, there was, and I might say, too, in answer to Mr. Walker, further, when he speaks of warehousemen that includes a number of job classifications. I don't recall right now whether each one of those job classifications was actually better than any comparable rate in the city.

Trial Examiner Bokar: I believe we had some testimony by Mr. Estabrook that he disputed the figures gathered by you, or at least your representation that the respondent was paying equal or better wages than other concerns in the City of Portland who employed warehousemen, or who employed people who fell within the classification of "Warehousemen", as contended for by the union.

The Witness: Well, Mr. Estabrook did state that he thought we were not paying as much as the others. He didn't make a point of it, if that is what you mean.

Mr. Walker: I think that is all. Just one more question.

Trial Examiner Bokar: All right.

Mr. Walker: Never mind; that is all.

Trial Examiner Bokar: If you want to add to your last answer, Mr. Powell, you may do so.

The Witness: Yes. As I understand his question, I was wondering if he was referring to the meetings prior to the strike, or the meetings after the strike was called. I think that might be important.

(Testimony of W. P. Powell.)

Trial Examiner Bokat: Why? Had the wage situation changed? [653]

The Witness: No, but the fact that you asked me if Mr. Estabrook stated we were not paying as high wages.

Trial Examiner Bokat: I don't know whether he made the statement before or after. I was not so particularly concerned as to when he made it, but whether he did make it.

The Witness: Well, he did make it at one of the meetings after the strike was called.

Trial Examiner Bokat: Any redirect?

Redirect Examination

Q. (Mr. Ball) Are we a member of any Employers' Association in Portland?

A. No, we are not, to my knowledge.

Q. And did you at the meetings subsequent to the strike foreclose Mr. Estabrook's opportunity to prove the fact that our wage scale was not comparable?

A. No, I did not.

Mr. Ball: That is all.

Trial Examiner Bokat: You are excused.

(Witness excused)

Mr. Ball: The respondent rests.

Trial Examiner Bokat: The respondent has rested. And I assume the Board will rest without any rebuttal?

Mr. Walker: We will have two witnesses. Very short witnesses.

Trial Examiner Bokat: I will state that I have not as yet read the exchange of correspondence between Mr. Powell and Mr. [654] Barr, and I want to check my notes before we close, to be sure that everything is before me, so that I can make a determination of the issues without finding something missing. So I will declare a recess now of half an hour, and then we will come back and resume after that time.

I now declare a recess for half an hour.

(Whereupon, at this time a recess was taken, after which proceedings were resumed as follows:)

Trial Examiner Bokat: The hearing is now in session.

Mr. Ball: It is stipulated between the parties that the strike in Sears Roebuck at Seattle, which has been referred to in this hearing, occurred on November 19 and November 20.

Trial Examiner Bokat: 1940?

Mr. Ball: 1940.

Mr. Walker: I will agree to that, but, for the purpose of the record, I want it understood by consenting to the stipulation, I am not admitting the materiality of that matter.

Trial Examiner Bokat: All right, call your witness.

J. W. ESTABROOK

previously sworn, was recalled as a witness by and on behalf of the Board, and further testified as follows:

Trial Examiner Bokar: You are now being recalled as a witness for the Board. You have been previously sworn. Your name is what?

The Witness: J. W. Estabrook. [655]

Direct Examination

Q. (Mr. Walker) There has been some testimony in the record to the effect that, at a meeting in either Oakland or San Francisco at which you were present, a meeting with Mr. Powell, Mr. White also being there, Mr. White said that unless the company agreed to a closed shop in Portland, the Warehousemen would strike Montgomery Ward in the eleven western states. What is the fact as to whether or not that statement was made?

A. I never heard that statement.

Q. There has been also some testimony that at that same meeting Mr. White also stated that all he had to do was to send a teletype and call the men, and that is "just what we will do". What is the fact as to whether or not that statement was made?

A. I never heard that one, either.

Q. At any of your meetings with Mr. Powell, was the statement made by Mr. Powell that the wages paid to the warehousemen by Montgomery Ward in Portland were equal to or better than the

(Testimony of J. W. Estabrook.)

wages paid to other warehousemen in the Portland area?

A. I have heard Mr. Powell make that statement, yes.

Q. Was there anything said by Local 206 to that matter? A. Yes.

Q. What?

A. We didn't quite agree with him.

Mr. Ball: I move to strike the answer that the Union didn't agree with Mr. Powell's statement as not tending to prove or [656] disprove any issue in this case.

Trial Examiner Bokat: You are referring to the answer and not the question?

Mr. Ball: Let the record show that I am including both the question and the answer, and, that I would like to have this objection be shown as preceding the answer.

Trial Examiner Bokat: I will let the question be answered if the witness will state what was said in reply to the statement made by Mr. Powell.

The Witness: Mr. Powell made the statement that Montgomery Ward in Portland were paying as much as anyone else for the same type of work in Portland. I, myself, disagreed with him and told Mr. Powell that he was paying considerably less than people in the same type of business were paying.

Mr. Ball: I move to strike that for the same reason.

(Testimony of J. W. Estabrook.)

Trial Examiner Bokat: The motion is denied.

Q. (Mr. Walker, continuing) Did you give any specific reference or example showing wherein there was a difference between the wages paid by Montgomery Ward and other firms for the same kind of work?

A. Yes, I did.

Mr. Ball: Just a moment. I move to strike that. I also want to have the objection shown before the answer of the witness. I move to strike that as having already been gone into by the same witness.

[657]

Trial Examiner Bokat: I will agree with that, but I will let him amplify it, if he thinks that it is necessary.

Mr. Ball: For the further reason that it is immaterial to any of the issues in this case.

Trial Examiner Bokat: I will let it stand.

Mr. Walker: Mr. Nelson, will you read the question to the witness?

(Thereupon the last question was read aloud by the reporter as above recorded.)

A. Yes, I did.

Q. (Mr. Walker, continuing) What examples did you point out to him?

Trial Examiner Bokat: Your objection runs to the entire line, Mr. Ball?

Mr. Ball: Yes, if the Examiner please.

The Witness: Shall I answer the question?

Trial Examiner Bokat: Yes.

A. Meier & Frank, Roberts Brothers, Sears Roe-

(Testimony of J. W. Estabrook.)

buck, Honeyman Hardware; all of the wholesale plumbing concerns.

Mr. Walker: That is all.

Cross Examination

Q. (Mr. Ball) Mr. Estabrook, how long did this meeting of November 25 at Oakland last? Do you recall?

A. Oh, quite a while; the biggest part of the afternoon.

Q. And this meeting did follow the formation of the committee [658] to which you testified in your direct examination, the committee to organize Montgomery Ward in the eleven western states?

A. I can't answer that "yes" or "no".

Q. Now, Mr. White, who has been mentioned as the spokesman for the entire meeting,—he was the spokesman for the entire meeting, was he not?

A. I don't think so. He led off and started the conversation. He certainly wasn't speaking for me.

Q. As a matter of fact, he probably did more talking at the meeting than anyone else, including yourself?

A. I think it was about even.

Q. You did quite a bit of talking?

A. That is right.

Q. Of course, you never suggested, either of you, at that time, that there might be strike action taken against Montgomery Ward, did you?

A. I don't recall that; we might have, however.

Q. And you didn't suggest that something had

(Testimony of J. W. Estabrook.)

to be done before a definite date or strike action would be taken? A. I think we did.

Mr. Ball: That is all.

(Witness excused)

Mr. Walker: Mrs. Fullerton.

FRANCES BERNICE FULLERTON [659]

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Bokat: Give your name and address to the reporter.

The Witness: Frances Bernice Fullerton, 7325 North Williams.

Trial Examiner Bokat: Portland?

The Witness: Yes.

Direct Examination.

Q. (Mr. Walker) You are the wife of Robert Fullerton, are you? A. Yes, sir.

Q. In the month of December, 1940, did a Mr. McGowan come to your home? A. Yes.

Q. Prior to that time, had he ever been to your home? A. No.

Trial Examiner Bokat: That is, to your knowledge?

The Witness: To my knowledge.

Trial Examiner Bokat: All right.

(Testimony of Frances Bernice Fullerton.)

Q. (Mr. Walker, continuing) Do you remember the incident of the strike taking place at Montgomery Ward here? A. Yes.

Q. About how long was it after the time when the strike started when Mr. McGowan came to your home?

A. Well, I don't remember the date; it was shortly after.

Q. About how many days? [660]

A. Oh, maybe one or two.

Q. Has Mr. McGowan been to your home at any time since that date? A. No.

Mr. Walker: That is all.

Mr. Ball: No cross examination.

Trial Examiner Bokar: The witness is excused.

(Witness excused)

(Thereupon a document was marked as Board's Exhibit 13 for identification.)

Mr. Walker: May I state that the markings appearing on Board's Exhibit 13 for identification, except those which are made in red ink, may be disregarded in consideration of the same.

Trial Examiner Bokar: Is that agreeable, Mr. Ball?

Mr. Ball: That is all right.

Trial Examiner Bokar: Now, you are offering Board's Exhibit 13 in evidence pursuant to the stipulation heretofore entered?

Mr. Walker: That is right.

Trial Examiner Bokat: It will be received and marked in evidence.

(Whereupon the document heretofore marked Board's Exhibit 13 for identification was received in evidence.)

Mr. Walker: I now move that paragraph 7 of the complaint be amended by inserting after the word "in" in the last line on [661] page 3 thereof and preceding the word "selling", the words "handling or"; and following the word "selling", again on the last line of page 3 thereof, the following: "merchandise, including display helpers, tire mounters, stockmen, order fillers, markers, messengers, outside salesmen and floor cashiers."

Trial Examiner Bokat: Off the record.

(Discussion off the record)

Trial Examiner Bokat: The motion is granted. Does the Board rest?

Mr. Walker: The Board rests, and I also move that the complaint be amended to conform to the proof.

Trial Examiner Bokat: The motion is granted.

Mr. Walker: My motion is not directed to any substantial matter in the complaint, Mr. Examiner. It is not directed, rather, to any substantive matter.

Trial Examiner Bokat: Just names, dates, and spelling, and such minor details?

Mr. Walker: That is correct.

Trial Examiner Bokat: All right, I will grant the motion.

Mr. Ball: Now, the record shows that the Board has rested?

Mr. Walker: Yes.

Mr. Ball: And that both sides have rested?

Trial Examiner Bokat: That is correct, unless the respondent has something. [662]

Mr. Ball: No, we rest.

Trial Examiner Bokat: All right. Is there anything further?

Mr. Ball: Now comes the respondent and moves the Examiner and the Board to dismiss this case case for the following reasons, to-wit:

First, that the evidence produced by the Board fails to show any failure on the part of the respondent to bargain collectively with any representative of its employees at Portland, Oregon or in the manner charged in the complaint;

Second, that the evidence produced by the Board fails to show that this strike which is now in existence in Portland, Oregon, was in any way due to any unfair labor practices on the part of the respondent;

Third, that the record as a whole fails to show the existence of any refusal to bargain collectively on the part of this respondent;

Fourth, that the record as a whole fails to show that this strike was in any way related to any unfair labor practices on the part of this respondent;

Fifth, that the record affirmatively shows that at all times the respondent has, when requested by representatives of its employees and by the charging

unions, met with and bargained with representatives selected by its employees, in good faith.

Sixth, that the record affirmatively shows that the strike here was due to other reasons than the existence of any failure [663] to bargain collectively, and, more specifically, the record affirmatively shows that the strike in this case was due to the failure of this respondent to accept the demands made by the charging unions for a closed shop, including by that term such variants as "union shop" or "union preference";

Next, that the record fails to show that the unit represented by the Retail Clerks is a proper unit for collective bargaining purposes; that the Retail Clerks' Union has at no time been selected by a majority of the employees in a proper unit of the respondent to represent them in collective bargaining; and that the record affirmatively shows a history of collective bargaining between the parties, which recognized a different unit as appropriate than that set forth in the complaint, as amended.

I think further elaboration on that motion would be unnecessary, but, if the Examiner please, there is one theory of the case, with relation to one phase of this motion, which, if I stated more fully or elaborated on our position more fully, might clarify the issue.

Trial Examiner Bokar: Suppose I first rule on the motion?

Mr. Ball: Yes.

Trial Examiner Bokar: I reserve decision on the several motions.

Mr. Ball: The theory of the case which we possess, and which I would like to explain to the Examiner, relates only to one of [664] the three or four issues which are raised by the pleadings and the evidence in this case.

The four issues, as we view them, are: (1) whether or not there was a failure to bargain collectively on the part of the respondent at any time with either of the charging unions subsequent to November 1st; (2) the second issue is whether any such failure did, in fact, cause or amount to a cause for the strike; (3) the third issue is whether the Retail Clerks, as a charging union, did have an appropriate unit so that there could have been a failure to bargain with them,—did have a majority of the appropriate unit; (4) and the fourth issue is whether or not this social conversation of Mr. McGowan's amounts to an 8-1 violation.

Of those issues, the one that perhaps deserves some explanation is the question of whether or not this strike was in any way due to unfair labor practices, namely, the failure to bargain collectively.

The respondent's theory of the cause of this strike may be pointed out by examining certain facts which are disclosed by this record.

After the certification of the Warehousemen as a bargaining agent here in Portland, which oc-

curred August 10, there was no activity on the part of the Warehousemen to solicit a contract or to negotiate a contract until sometime towards the end of September, and no pressure on the company was made, [665] or no definite or specific request was made until sometime later.

Some of the exhibits in this case indicate or suggest that the reason for that was a desire on the part of some of the other unions to organize the company.

Now, a large part of the delay between the date of certification and the date when negotiations started was thus due to causes which are not causes in any way ascribable to conduct on the part of this respondent.

Sometime in October,—October 22,—the Retail Clerks and the Office Workers, together, did meet with the company. At that time, it was clearly ascertained by both parties that a substantial item of disagreement existed upon a major issue, namely, the demand made by those two unions that a contract be signed, covering the entire store which contained a closed shop clause.

The evidence shows that these unions, especially the Retail Clerks' Union, had a number of contracts in the City of Portland, all of which included the Closed Shop Clause, and for that reason, it did not seem to the officials of that Union practicable to waive their demands for that closed shop clause.

The evidence in this record shows that in the meeting held by the Warehousemen, the closed shop clause was also the major issue, and there was

a constant source of reiteration on the part of the representatives of the Warehousemen's Union indicating [666] a complete futility of agreement, unless there was acquiescence in that demand.

Sometime in November, around November 19 or 20, a strike was called at Sears Roebuck in Seattle, at which place they have a mail order house, a unit comparable to the mail order house unit which exists here at Portland. The result of that strike was that Sears made a closed shop agreement.

An organization known as the Western Warehouse Conference has a vice-president by the name of Glazier, who is the head of a Teamsters Union at Seattle. At Seattle, resides also the vice-president of the International 'Teamsters' Union, Dave Beck. Montgomery Ward has no unit in operation at Seattle that has any employees of the kind Mr. Glazier would be interested in organizing, yet Mr. Glazier was appointed on a committee to organize Montgomery Ward in the eleven western states.

This committee was announced quite publicly, and had as its spokesman and secretary, the secretary of the Western Warehouse Council, a man by the name of White, from either Oakland or San Francisco.

At a meeting of November 25, he appeared purporting to speak for the entire A F of L on the Pacific Coast, and delivered an ultimatum to Montgomery Ward & Company that we would have to agree in Portland to a closed shop clause, with the indication that that demand would be made in other locations. [667]

Shortly after that, after the ultimatum was given, a meeting was held in Los Angeles, attended by, among others, Dave Beck, in which the committee discussed a program, and in which there was discussed the possibility of Teamsters' support to any strike action that might be taken against Montgomery Ward.

And strike action did follow at Oakland on December 4.

It is our contention that the strike action was due entirely to the organizing efforts that were directed in this fashion.

On December 5 or 6, a meeting was held in Oakland, in which Mr. White, still purporting to speak for the Portland Warehousemen and the Portland Retail Clerks, promised that if negotiations were continued, there would be no strike at Portland.

Nevertheless, the strike was called here, purportedly called on the word of Mr. White by the Retail Clerks first; and the Retail Clerks are the union, as has been already demonstrated in the record, which had a policy adopted as to contractual negotiations which made it impossible for them to back away from a closed shop clause.

I call the Examiner's attention to that fact, because I think that sets forth the facts relating to the causation of the strike here at Portland.

Mr. Walker: The Board resists the motion.

Trial Examiner Bokat: The record will so show. Is there [668] anything further? Off the record.

(Discussion off the record.)

Trial Examiner Bokat: The hearing is now closed, if there is nothing further.

(At 5:15 p. m. April 17, 1941, hearing concluded.)

[669]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10108

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONTGOMERY WARD & COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, “In the Matter of Montgomery Ward & Company and Warehousemen’s Union, Local No. 206,

Chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Affiliated with the American Federation of Labor," and "In the Matter of Montgomery Ward & Company and Retail Clerks' International Protective Association, Local 1257, Affiliated with the American Federation of Labor," the same being Cases Nos. C-1905 and 1906, respectively, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

R-1863

(1) Petition for investigation and certification of representatives filed by Warehousemen's Union Local #206, affiliated with I. B. of T. C. S. H. of A., sworn to April 5, 1940.

(2) Copy of order directing investigation and hearing, dated April 27, 1940.

(3) Notice of hearing issued by the National Labor Relations Board, May 6, 1940.

(4) Order postponing hearing issued by the National Labor Relations Board, May 9, 1940.

(5) Certified copy of order designating Thomas P. Graham, Jr. Trial Examiner for the National Labor Relations Board, dated May 24, 1940.

Documents listed hereinabove under items 1-5, inclusive, are contained in the exhibits and included under the following item:

(6) Stenographic transcript of testimony before Trial Examiner Graham on May 27 and 28, 1940, together with all exhibits introduced in evidence.

(7) Copy of decision and direction of election issued by the National Labor Relations Board on June 24, 1940.

(8) Copy of order correcting decision and direction of election, dated June 25, 1940.

(9) Copy of election report issued by the National Labor Relations Board, July 22, 1940.

(10) Copy of certification of representatives issued by the National Labor Relations Board on August 10, 1940.

C-1905 and 1906

(11) Charge filed by Warehousemen's Union, Local No. 206, affiliated with I. B. of T., C., W., & H. of A., Labor Temple, sworn to December 10, 1940.

(12) Charge filed by Retail Clerks International Protective Association, Local No. 1257, sworn to December 19, 1940.

(13) Copy of order consolidating cases issued by the National Labor Relations Board on March 28, 1941.

(14) Consolidated complaint issued by the National Labor Relations Board on March 31, 1941.

(15) Notice of hearing issued by the National Labor Relations Board on March 31, 1941.

(16) Respondent's answer to the consolidated complaint, sworn to April 7, 1941.

(17) Certified copy of order designating George Bokar Trial Examiner for the National Labor Relations Board in Cases Nos. XIX-C-847 and XIX-C-851, dated April 10, 1941.

Documents listed hereinabove under items 7 and 10-17, inclusive, are contained in the exhibits and included under the following item:

(18) Stenographic transcript of testimony before Trial Examiner Bokar on April 14, 15, 16, and 17, 1941, together with all exhibits introduced in evidence.

(19) Copy of intermediate report of Trial Examiner Bokar, dated June 11, 1941.

(20) Copy of order transferring cases to the Board, dated June 24, 1941, together with annexed notice.

(21) Copy of respondent's exceptions to the intermediate report.

(22) Copy of respondent's letter, dated July 14, 1941, requesting oral argument.

(23) Copy of notice of hearing for purpose of oral argument, dated July 23, 1941.

(24) Copy of list of appearances at oral argument held August 5, 1941.

(25) Copy of decision, findings of fact, conclusions of law and order issued by the National Labor Relations Board, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof the Executive Secretary of the National Labor Relations Board, being thereun-

to duly authorized as aforesaid, has hereunto set her hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 1st day of April, 1942.

(Seal)

BEATRICE M. STERN,

Executive Secretary

National Labor Relation Board

[Endorsed]: No. 10108. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Montgomery Ward & Company, Respondent. Montgomery Ward & Company, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of **Record**. Upon Petition for Enforcement and Upon Petition for Review of an Order of the National Labor Relations Board.

Filed: April 6, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, by its counsel, and pursuant to Section 6 of Rule 19 of the Court, the Board submits the following statement of points upon which it intends to rely in the Trial of the above-entitled case to the Court:

I.

The National Labor Relations Act is applicable to respondent.

II.

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

III.

The Board's order is wholly valid and proper under the Act.

ERNEST A. GROSS

Associate General Counsel
National Labor Relations Board

Dated at Washington, D. C., this 31st day of March, 1942.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Montgomery Ward & Co., Incorporated (hereinafter sometimes referred to as Wards), an Illinois corporation, Respondent and cross-petitioner herein, presents this, its statement of points, and says that the Order issued on or about November 29, 1941 by the National Labor Relations Board, the review of which is sought herein is erroneous, unauthorized, and insufficient in law and should be reviewed and set aside for the following reasons:

1. The National Labor Relations Board erred in finding:

“that on September 19, 1940, and at all times thereafter, the respondent has refused to bargain with the Retail Clerks and the Warehousemen as the exclusive representative of its employees in appropriate units with respect to rates of pay, wages, hours of employment, and other conditions of employment.”

2. The National Labor Relations Board erred in deciding as a matter of law that:

“By refusing to bargain collectively with Warehousemen’s Union Local No. 206, chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and Retail Clerks’ International Protective Association, Local No. 1257, respectively, as the exclusive representatives of its employees in the respective appropriate

units, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act."

3. The National Labor Relations Board erred in finding:

"that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

4. The National Labor Relations Board erred in deciding as a matter of law that:

"By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act."

5. The National Labor Relations Board erred in finding:

"that the respondent's refusals to bargain caused and prolonged the strike at Portland, which began on December 7, 1940."

6. The National Labor Relations Board erred in deciding as a matter of law that Wards was under a duty to agree to do what the law compelled it to do in any event.

7. The National Labor Relations Board erred in deciding as a matter of law that the duty to

bargain compelled Wards to offer concessions to Union demands.

8. The National Labor Relations Board erred in deciding as a matter of law that Wards was obligated to submit written counter-proposals to the Union.

9. The National Labor Relations Board erred in deciding as a matter of law that the National Labor Relations Act deprived Wards of the right to match dilatory tactics of the Union by similar tactics of its own.

10. The National Labor Relations Board erred in deciding as a matter of law that the National Labor Relations Act prohibits an employer from telling its employees that its plant remains open despite a strike.

11. The National Labor Relations Board erred in deciding that Ward's supposed refusals to agree to do what the law compelled it to do support an inference that Wards was unwilling to contract with the Unions.

12. The National Labor Relations Board erred in deciding that refusals by Wards to offer concessions to Union demands support an inference that Wards was unwilling to contract with the Unions on acceptable terms.

13. The National Labor Relations Board erred in deciding that Ward's refusal to submit written counterproposals supports an inference that Wards was unwilling to contract with the Unions on acceptable terms.

14. The National Labor Relations Board erred in deciding that Ward's two day delay in the course of negotiations with the Union supports an inference that Wards was unwilling to contract with the Unions.

15. The National Labor Relations Board erred in deciding that Ward's action in telling its employees that its plant remained open despite a strike supports an inference that Wards was unwilling to contract with the Unions.

16. The National Labor Relations Board erred in deciding that Ward's rejection of Union demands because they were not consonant with company policy or practice supports an inference that Wards was unwilling to contract with the Unions.

17. The National Labor Relations Board erred in deciding that the Board's judgment that the terms upon which Wards insisted were unreasonable supports an inference that Wards was unwilling to contract with the Unions.

18. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence that:

“The respondent, although requested to do so, did not agree to embody understandings that might be reached with the Unions in signed contracts.”

19. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence that while Wards offered to assert its recog-

dition of the union in "a preliminary whereas clause" it:

"refused to agree to a clause . . . by which respondent promised to recognize it as exclusive representative . . ."

20. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence that Wards:

"refused at their meetings to insert in the contract . . . a clause by which the respondent promised not to discriminate because of union membership."

21. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon declarations of Ward's representatives that:

". . . It is the Union, not the company which is seeking an agreement

and

"his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company"

or upon the passage from Ward's brief to the National Labor Relations Board that:

"the duty to bargain is no more than . . . the duty to meet the employee representative and do . . . or say nothing that would make a binding trade agreement impossible of attainment."

22. The National Labor Relations Board erred in basing a finding of refusal to bargain upon evidence of a refusal to submit counter-proposals or written counter-suggestions, or that Wards persisted:

“in the view that the obligation of taking further steps rested upon the Unions alone. Thus the respondent was opposed to submitting to the Unions genuine counter-proposals”

or that Wards objected to

“taking the initiative in the bargaining process.”

23. The National Labor Relations Board erred in basing a finding of refusal to bargain upon Ward's:

“repeated rejection of the Union proposals on the general ground that they were not consonant with company policy or practice.”

24. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence that:

“although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28.”

25. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence of Ward's “inconsistent behavior” in sup-

posedly changing its position on three matters during the course of negotiations.

26. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon evidence that Wards:

“solicited the individual striking employees to return to work in violation of Section 8 (1) of the Act.”

27. The National Labor Relations Board erred in basing a finding of a refusal to bargain upon the total or any portion of the evidence referred to in paragraphs 18 to 26 herein.

28. The National Labor Relations Board erred in finding without substantial evidence in support thereof that Wards changed its position or acted inconsistently during the course of negotiations.

29. The National Labor Relations Board erred in finding without substantial evidence in support thereof that Wards:

“solicited the individual striking employees to return to work in violation of Section 8 (1) of the Act.”

30. The National Labor Relations Board erred in appraising the weight of the evidence upon the issue of failure to bargain in the light of its mistaken belief that Wards was under a duty to agree to do what the law compelled it to do in any event.

31. The National Labor Relations Board erred in appraising the weight of the evidence upon the issue of failure to bargain in the light of its mis-

taken belief that the duty to bargain compelled Wards to offer concessions to Union demands.

32. The National Labor Relations Board erred in appraising the weight of the evidence upon the issue of failure to bargain in the light of its mistaken belief that Wards was obligated to submit written counter-proposals to the Union.

33. The National Labor Relations Board erred in appraising the weight of the evidence upon the issue of failure to bargain in the light of its mistaken belief that the National Labor Relations Act deprived Wards of the right to match dilatory tactics of the Union by similar tactics of its own.

34. The National Labor Relations Board erred in appraising the weight of the evidence upon the issue of failure to bargain in the light of its mistaken belief that the National Labor Relations Act prohibits an employer from telling its employees that its plant remains open despite a strike.

STUART S. BALL

Attorney for Petitioner

Montgomery Ward & Co.,

Incorporated

[Endorsed]: Filed Apr. 13, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Subject to This Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the above-named parties, that the printing of the Board's Exhibit No. 9, Constitution of Retail Clerks' International Protective Association, designated by the respondent, may be dispensed with. Provided, however, that said exhibit may be referred to in the original certified record with the same force and effect as though printed.

Dated at Washington, D. C., this 22nd day of April, 1942.

ERNEST A. GROSS

Associate General Counsel
National Labor Relations
Board

Dated at Evanston, Illinois, this 28 day of April, 1942.

STUART S. BALL

Attorney for Respondent

So Ordered:

CURTIS D. WILBUR

Circuit Judge

[Endorsed]: Filed May 4, 1942. Paul P. O'Brien,
Clerk.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT. 3

No. 10108

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

v.

MONTGOMERY WARD & COM-
PANY,

Respondent.

MONTGOMERY WARD & COM-
PANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Upon Petition for Enforcement
and Upon Cross-Petition for Re-
view and to Set Aside an Order
of the National Labor Relations
Board.

**BRIEF OF MONTGOMERY WARD & CO., INCORPO-
RATED, UPON ITS PETITION FOR REVIEW AND
TO SET ASIDE AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD.**

FILED

JUL 6 - 1942

STUART S. BALL,
619 West Chicago Avenue,
Chicago, Illinois,
Attorney for Petitioner.

PAUL P. O'BRIEN,

CLERK

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 10108

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

v.

MONTGOMERY WARD & COM-
PANY,

Respondent.

MONTGOMERY WARD & COM-
PANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Upon Petition for Enforcement
and Upon Cross-Petition for Re-
view and to Set Aside an Order
of the National Labor Relations
Board.

BRIEF OF MONTGOMERY WARD & CO., INCORPORATED, UPON ITS PETITION FOR REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THE PARTIES.

Hereafter in this brief we shall refer to the petitioner and cross-respondent, National Labor Relations Board, as the "Board"; to the respondent and cross-petitioner, Montgomery Ward & Co., Incorporated, an Illinois corporation, as "Wards"; to the Warehousemen's Union, Local 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, as the "Warehousemen"; to the Retail Clerks' Inter-

national Protective Association, Local No. 1257, as the "Clerks"; and to the latter two organizations collectively as the "Unions".

THE TERMS USED.

Hereafter in this brief we shall refer to the National Labor Relations Act (an Act of Congress approved July 5, 1935, c. 372, 49 Stat. 449-457, U. S. C. A., Title 9, Sections 151-166) as "the Act"; and to all forms of the closed shop, whether called "union shop", "union preference shop", or something else, as the "closed shop".

STATEMENT AS TO JURISDICTION.

Upon charges filed December 13 and December 21, 1940, that Wards had violated sections 8 (1) and 8 (5) of the Act (R. 1-6), the Board held hearings from April 14 to April 17, 1941. On November 29, 1941, the Board issued its Decision and Order, holding Wards guilty. This Decision and Order is set out on pages 22-85 of the Record.

On April 6, 1942, the Board filed its petition for enforcement before this Court (R. 86-94). On April 13, 1942, Wards filed a Cross-Petition for review and to set aside the Board's Order (R. 97-99) and also filed its answer to the Board's Petition (R. 95-96). To this Cross-Petition, Wards attached a statement of Points (R. 902-909).

The jurisdiction of this Court to hear the cause thus presented derives from Section 10 (f) of the Act (29 U. S. C. A., Sec. 160).

STATEMENT OF THE CASE.

Wards operates, in Portland, Oregon, a mail order house employing in May, 1940, about 1,200 persons (R. 27, 110) and a retail store employing 175 persons (R. 27, 110). On August 10, 1940, the Board certified the Ware-

housemen as representatives of some 470 employees of the mail order house (R. 120). On August 6, 1940, the Clerks, claiming a majority, requested bargaining privileges (R. 321-2). A question as to the proper unit arising, the Clerks and another union claiming to represent "office workers" agreed on October 2, 1940, to negotiate jointly for "one contract * * * covering the entire retail store" (R. 323). The two unions jointly were recognized by the entrance of Wards into negotiations with them on October 22, 1940 (R. 818-823).

Wards was represented at the ensuing negotiations by W. B. Powell, its West Coast labor representative (R. 34) and by various members of its local management. Powell reported to John A. Barr of Chicago, Wards' "official in charge of labor relations and collective bargaining" (R. 34). Each of the collective bargaining sessions was fully reported in writing by Powell to Barr (Wards' Exhibits 14, 15, 16, 19, 20, 21, 22, 23, and 24). These reports were credited by the Board, which freely quoted from them in its findings. The collective bargaining sessions were held as follows:

1. October 22—Meeting with Clerks and Office Workers at Portland (See Wards' Ex. 24, R. 818-823)
2. November 12—Meeting with Warehousemen at Portland (See Wards' Ex. 19, R. 736-744)
3. November 25—Meeting at Oakland, Cal., with Warehousemen and Clerks (See Wards' Ex. 20, R. 745-747)
4. December 13—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 21, R. 748-755)
5. December 14—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 22, R. 755-759)
6. December 16—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 23, R. 760-771)

The Board found that failure to bargain occurred at all of these meetings (R. 24).

At the November 25th meeting, the union spokesmen presented Wards with an ultimatum to agree to a closed shop throughout the Pacific Coast area (R. 47, 745). Wards did not agree, and on December 4, 1940, its Oakland, California store and house were picketed (R. 48). This was followed by a strike at Portland beginning December 7 (R. 49), which was still existent at the time of the hearings beginning April 14, 1941. The Board found that this strike was "caused and prolonged" by the supposed failure to bargain (R. 69).

On December 8, 1940, Wards instructed its supervisors at Portland to telephone employees that:

"Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in" (R. 69).

The Board held that these telephone messages were a "solicitation" of employees to return to work in violation of Section 8 (1) of the Act.

One supervisor (McGowan), in the words of the Board, "went beyond these instructions" (R. 70), and made certain remarks to three employees which the Board regards as amounting also to a violation of Section 8 (1).

The only controverted questions of fact were whether McGowan made the statements ascribed to him, and certain minor discrepancies as to what was said at the meeting of November 25th.

SPECIFICATION OF ERRORS RELIED UPON.

(References to the portion of this Brief which argues the specification are indicated in each instance.)

1. The Board erred in failing to find on the undisputed evidence that Wards fulfilled its duty under the Act to bargain collectively. (Propositions I and II.)

2. The Board erred in finding that Wards:

“has refused to bargain with the Retail Clerks and the Warehousemen as the exclusive representative of its employees in appropriate units with respect to rates of pay, hours of employment, and other conditions of employment” (R. 68-69),

for the reason that this finding is not supported by substantial evidence. (Propositions II and III.)

3. The Board erred in holding, as a matter of law, that Wards was under the legal duty to promise, in advance of any agreement, to

“embody understandings that might be reached with the Unions in signed contracts” (R. 58; see also R. 59-60)

for the reason that the Act does not require an employer formally to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

4. The Board erred in holding, as a matter of law, that Wards was under a legal duty

“to agree to a clause * * * by which the respondent promised to recognize it (the Union) as exclusive representative” (R. 61)

although it had already recognized the Unions in fact, since the Act does not require an employer to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

5. The Board erred in holding, as a matter of law, that Wards' offer to include recognition as a "preliminary whereas clause" did not "satisfy respondent's obligation" (R. 61) and that Wards was obliged to "bind itself to give exclusive recognition" (R. 61), since the Act does not require an employer to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

6. The Board erred in interpreting the Act as requiring an employer to do more than to agree to contract on the basis of the *status quo*, and as requiring him to offer concessions to union demands (R. 62-63, 65-66). (Proposition I, division B, subdiv. 1; Proposition III, division C.)

7. The Board erred in holding, as a matter of law, that Wards' "refusal to submit *** written countersuggestions" to the Union demands evidenced "a want of good faith and, hence, a refusal to bargain" (R. 65), since the Act does not require an employer who has stated his unwillingness to offer more than the *status quo* on given points, and who has answered all requests to explain the *status quo*, to make a formal written "countersuggestion". (Proposition I, division B, subdiv. 2; Proposition III, division 6, subdiv. 3.)

8. The Board erred, as a matter of law, in holding that Wards
 "in thus relying simply on existing practice as a reason for not agreeing to union proposals, failed to fulfill its obligation to discuss freely and fully their [the parties'] respective claims and demands and, when these are opposed, to justify them on reason" (R. 66)

for the reason that the Act does not require an employer to justify its position as to Union demands to the satisfaction of the Board, and the Act does not permit the Board to pass judgment upon the reasonableness of an employer's position. (Proposition I, division B; Proposition III, division C, subdiv. 4, and division F.)

9. The Board erred, as a matter of law, in treating arguments advanced in Wards' brief before the Board as evidence that Wards had previously failed to bargain in good faith (R. 63).

10. The Board erred in holding, as a matter of law, that Wards
 "violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67)
 in violation of Section 8 (5) of the Act by its telephone messages to employees telling them that the plant would continue to operate and their jobs be open. (Proposition III, division G.)

11. The Board erred in finding that Wards "demonstrated its refusal to bargain collectively in good faith" (R. 62) because it
 "refused * * * to insert in the contract with the Warehousemen a clause by which the respondent promised not to discriminate because of Union membership" (R. 61)
 for the reason that such discrimination, being prohibited by law, was not a proper subject for collective bargaining. (Proposition III, division B, subdiv. 4.)

12. The Board erred in finding that

“the respondent’s attitude and conduct with respect to the union’s requests for counterproposals evidences a want of good faith” (R. 65)

for the reason that Wards’ refusal to submit written counterproposals or to make counterproposals incorporating concessions does not substantially support any inference that Wards was unwilling to contract on a basis acceptable to it. (Proposition III, division D.)

13. The Board erred in finding the evidence that

“although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28” (R. 66)

substantially supported an inference that Wards was unwilling to reach an agreement with the Unions on acceptable terms. (Proposition III, subdiv. E.)

14. The Board erred in finding that Powell, Wards’ negotiator, engaged in “inconsistent behavior” (R. 66-67) since such finding is not supported by substantial evidence. (Proposition III, division F, subdiv. 1.)

15. The Board erred in inferring “bad faith” from Wards’ “repeated rejection of union proposals on the general ground that they were not consonant with company policy or practice” (R. 65-66) for the reason that the insistence of an employer that he will not make concessions by changing present practices does not substantially support such an inference. (Proposition III, division D, subdiv. 4.)

16. Even if the record contained some substantial support for a finding that Wards failed to bargain collectively, the Board erred in appraising the evidence under all or any of the mistaken views of the law covered in the specifications numbered 3, 4, 5, 6, 7, 8, 9 and 10 above. (Proposition IV.)

17. The Board erred in finding:

“that the respondent’s refusals to bargain caused and prolonged the strike at Portland, which began on December 7, 1940” (R. 69)

for the reason that the finding is not supported by substantial evidence.

18. The Board erred in finding that Wards

“by stating to the employees that ‘we are operating tomorrow as usual and your job is open for you if you want to come in’ was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity” (R. 74)

and in holding that, by “such solicitation”, Wards “interfered, restrained and coerced its employees” (R. 74) in violation of Section 8 (1) of the Act. (Proposition V.)

19. The Board erred in finding that Wards

“is clearly responsible for McGowan’s coercive statements to Blackburn, Fullerton and Hough” (R. 73)

for the reason that such finding is not supported by substantial evidence. (Proposition V.)

SUMMARY OF ARGUMENT.

We propose to show:

first, that the *undisputed facts* show that Wards bargained collectively in full compliance with the Act;

second, that the record is devoid of any evidence which, under a proper interpretation of the Act, would substantially support any finding that Wards failed to bargain collectively.

third, even if an intensive examination of the record might bring to light some dubious item of evidence sufficient to support a finding of failure to bargain, the Board's actual findings were made under a misconception of the Act and of the legal effect of certain of Wards' positions. A finding so made can no more be permitted to stand than a jury verdict, even though based on substantial evidence, when the instructions are erroneous.

fourth, no substantial evidence supports the finding that Wards was responsible for any actions amounting to interference with the exercise of rights guaranteed by the Act.

The main issue is whether Wards bargained collectively. The first three points outlined above all involve the proper definition of the duty to bargain. The first proposition to be advanced in this brief sets forth an analysis of the character and the extent of this duty. The next four propositions parallel the four points listed above.

ARGUMENT.

I.

The Order to Bargain Collectively Must Be Set Aside Unless Supported By Evidence of Conduct Which Constituted Either a Refusal to Recognize the Authority of the Union, Or a Refusal to Discuss Union Demands Sufficiently to Avoid Mutual Misunderstanding, Or a Refusal to Make Binding and Written Agreements on Such Terms, If Any, As Were Mutually Acceptable.

(Arguing Specifications of Error 1, 6, 7, and 8).

The National Labor Relations Act was drawn in the belief that if employees are given the right to organize, and this right is protected against employer interference, the organized employees, by their ability to employ economic weapons such as a strike, will persuade their employers to enter into binding trade agreements. Hence economic strife will tend to lessen. This was the basis on which the inclusion in the Act of the duty to bargain collectively was urged upon Congress by Lloyd K. Garrison, chairman of one of the two prior Labor Boards:

“I think while in many cases where you jam together an employer and a union and you say, ‘You have got to sit down and you have got to talk’ in many cases nothing will happen. They won’t agree, cannot agree; you are going to have a strike and so on. But in many cases they will. And the mere process of saying to that employer, ‘You have got to sit down and talk’ is a salutary thing because in a great many cases it will result to his surprise as well as everybody else in an agreement being arrived at.”

(Senate hearings on S. 1958, 74th Cong., 1st Sess., Part 2)

Recognizing this as the legislative belief, the United States Supreme Court has said:

“The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel.”

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893

These considerations almost automatically define the extent of the duty to bargain collectively:

“The Act * * * meant to give to the employees whatever advantage they would get from collective pressure upon their employer; and the question here is what are the fair implications of that grant.”

Art Metals Constr. Co. v. NLRB, (2d cir.), 110 Fed. (2d) 148, at p. 150

Because the duty to bargain was imposed in order to make trade agreements possible, a “fair implication” is that the duty to bargain is the duty to do that which is necessary before trade agreements on any basis are possible. The duty to bargain collectively can therefore be stated in the terms of those necessities:

- A. The duty to bargain collectively is no less nor more than the duty to recognize the authority of the employee representative, to participate in such discussion as is necessary to avoid mutual misunderstanding, and to enter into binding and written agreements on such terms, if any, as are mutually acceptable.**

These steps, without more, will make the attainment of a binding trade agreement possible. They will not always be enough to insure that agreement *will* result; but they are enough to insure that mutually satisfactory terms will be discovered *if they exist* and will be embodied in a contract.

The duty to bargain is no more nor less than the duty to take these necessary steps.

The following analysis of *all* of the court decisions upholding findings by the Board of failure to bargain shows that *in every instance* the finding was supported by evidence of failure to do what the definition here advanced requires the employer to do.

- 1. The employer must recognize the exclusive authority of the chosen representatives of his employees in an appropriate unit to speak and contract on behalf of all the employees in the unit.**

The legislative hope that binding trade agreements will result from the procedure of collective bargaining would be frustrated by a refusal to recognize the authority of employee spokesmen. For that reason the duty to bargain is expressly made "subject to the provisions of Section 9 (a)" which provides that the choice of the majority in a proper unit is "the exclusive representative of all the employees in such unit" (49 Stat. 453, U. S. C. A. Title 29, Sec. 159).

The duty to "recognize" the union as the "exclusive representative" of all employees in the unit is thus an integral part of the duty to bargain.

A refusal to "recognize" the union may be an express one. On the other hand, it may be evidenced by conduct clearly inconsistent with such recognition, such as attempts to make individual agreements with employees covering subjects contemporaneously being negotiated with the representatives of those employees, the taking of unilateral action as to matters being negotiated without advising the bargaining agency, and attempts during negotiations to weaken the authority of the union.

For these reasons, the Courts have sustained findings of failure to bargain when supported by evidence of:

- (a) An out-and-out refusal to grant recognition to a majority union:

NLRB v. Moltrup Steel Products Co., (3d cir.), 121 Fed. (2d) 612; *NLRB v. Louisville Refining Co.*, (6th cir.), 102 Fed. (2d) 678 (cert. den. 308 U. S. 568, 60 S. Ct. 81, 84 L. Ed. 477); *NLRB v. Piqua Minissing Wood Products Co.*, (6th cir.), 109 Fed. (2d) 552; *M. H. Ritzwoller Co. v. NLRB*, (7th cir.), 114 Fed. (2d) 432, at p. 436; *NLRB v. Bachelder*, (7th cir.), 120 Fed. (2d) 574, at p. 577 (cert. den. 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 79);

- (b) A refusal to accept reasonable proof of majority status, or a refusal to accept a reasonable procedure to ascertain the facts:

NLRB v. Remington Rand, Inc., (2d cir.), 94 Fed. (2d) 862 (cert. den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540); *NLRB v. Dahlstrom Metallic Door Co.*, (2d cir.), 112 Fed. (2d) 756; *NLRB v. Federbush Co., Inc.*, (2d cir.), 121 Fed. (2d) 954; *NLRB v. National Seal Corp.*, (2d cir.), 127 Fed. (2d) 776, at p. 778; *NLRB v. New Era Die Co., Inc.*, (2d cir.), 118 Fed. (2d) 500; *The Solvay Process Co. v. NLRB*, (5th cir.), 117 Fed. (2d) 83 (cert. den. 313 U. S. 596, 61 S. Ct. 1121, 85 L. Ed. 1549); *NLRB v. Texas Mining & Smelting Co.*, (5th cir.), 117 Fed. (2d) 86

- (c) A refusal to grant recognition in the mistaken belief that certification was erroneous:

Southern Steamship Co. v. NLRB, (3d cir.), 120 Fed. (2d) 505 (rev'd on another point 314 U. S. 594, 62 S. Ct. 100, 86 L. Ed. 64); *NLRB v. Lane Cotton Mills Co.*, (5th cir.), 111 Fed. (2d) 814

(appeal dismissed 310 U. S. 723, 61 S. Ct. 316, 85 L. Ed. 471); *NLRB v. Calumet Steel Div. of Borg-Warner*, (7th cir.), 121 Fed. (2d) 366, at pp. 368, 370

- (d) A refusal to recognize a majority union as a representative of employees other than its own members:

National Licorice Co. v. NLRB, 309 U. S. 350, at p. 358, 60 S. Ct. 569, 84 L. Ed. 799

NLRB v. Sunshine Mining Co., (9th cir.), 110 Fed. (2d) 780, at pp. 786-7, (cert. den. 312 U. S. 678, 61 S. Ct. 447, 86 L. Ed. 1118) ("a declaration of policy * * * emphasizing that respondent would 'bargain collectively * * * only to the extent of their membership'.") *Bethlehem Shipbuilding Corp., Ltd. v. NLRB*, (1st cir.), 114 Fed. (2d) 930 (appeal dismissed 312 U. S. 710, 61 S. Ct. 448, 85 L. Ed. 1141); *NLRB v. Moench Tanning Co.*, (2d cir.), 121 Fed. (2d) 951; *Hartsell Mills Co. v. NLRB*, (4th cir.), 111 Fed. (2d) 291; *NLRB v. Boss Mfg. Co.*, (7th cir.), 107 Fed. (2d) 574, at p. 577; *Stewart Die Casting Corp. v. NLRB*, (7th cir.), 114 Fed. (2d) 849, at p. 853, (cert. den., 312 U. S. 680, 61 S. Ct. 449, 85 L. Ed. 1119); *McQuay-Norris Mfg. Co. v. NLRB*, (7th cir.), 116 Fed. (2d) 748, at pp. 750, 751 (cert. den., 313 U. S. 565, 61 S. Ct. 843, 85 L. Ed. 1524); *NLRB v. Calumet Steel Division of Borg-Warner Corp.*, (7th cir.), 121 Fed. (2d) 366, at p. 370; *Wilson & Co., Inc. v. NLRB*, (8th cir.), 115 Fed. (2d) 759; *Continental Oil Co. v. NLRB*, (10th cir.), 113 Fed. (2d) 473 (cert. granted on another point, 311 U. S. 637, 61 S. Ct. 72, 85 L. Ed. 406)

- (e) A refusal to recognize a labor organization, as such, as the bargaining agent:

NLRB v. Griswold Mfg. Co., (3d cir.), 106 Fed. (2d) 713 (See, for the facts referred to by the Court, 6 NLRB at p. 308); *Pueblo Gas & Fuel Co. v. NLRB*, (10th cir.), 118 Fed. (2d) 304

- (f) A refusal to grant or to continue recognition in the mistaken belief that a majority union has lost its right to represent employees because of a strike or other reason:

NLRB v. Somerset Shoe Co., (1st cir.), 111 Fed. (2d) 681; *NLRB v. Reed & Prince Mfg. Co.*, (1st cir.), 118 Fed. (2d) 874 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *NLRB v. Highland Shoe, Inc.*, (1st cir.), 119 Fed. (2d) 218; *Black Diamond Steamship Corp. v. NLRB*, (2d cir.), 94 Fed. (2d) 875 (cert. den., 304 U. S. 579, 58 S. Ct. 1044, 82 L. Ed. 1542); *NLRB v. American Mfg. Co.*, (2d cir.), 106 Fed. (2d) 61 (affirmed but modified, 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988); *NLRB v. George P. Pilling & Son Co.*, (3d cir.), 119 Fed. (2d) 32; *Oughton v. NLRB*, (3rd cir.), 118 Fed. (2d) 486; *NLRB v. Chicago Apparatus Co.*, (7th cir.), 116 Fed. (2d) 753, at p. 758; *Valley Mould & Iron Corp. v. NLRB*, (7th cir.), 116 Fed. (2d) 760, at p. 764 (cert. den., 313 U. S. 590, 61 S. Ct. 1114, 85 L. Ed. 1545)

- (g) The negotiation or attempted negotiation of individual contracts with employees on terms inconsistent with the demands presented by the bargaining agent:

NLRB v. Reed & Prince Mfg. Co., (1st. cir.), 118 Fed. (2d) 874 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *NLRB v. Highland Shoe Inc.*, (1st cir.), 119 Fed. (2d) 218; *NLRB v. Hopwood Retinning Co.*, (2d cir.), 98 Fed. (2d) 97;

NLRB v. American Mfg. Co., (2d cir.), 106 Fed. (2d) 61 (affirmed but modified, 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988); *NLRB v. Lightner Publishing Corp. of Illinois*, (7th cir.), 113 Fed. (2d) 621, at p. 625; *Stewart Die Casting Corp. v. NLRB*, (7th cir.), 114 Fed. (2d) 849, at p. 853 (cert. den., 312 U. S. 680, 61 S. Ct. 449, 85 L. Ed. 1119)

- (h) The making of general and unilateral changes in wages or working conditions contemporaneously with bargaining negotiations without notice to or discussion with the bargaining agent (“presentation of a *fait accompli*”):

NLRB v. George P. Pilling & Son Co., (3rd cir.), 119 Fed. (2d) 32; *Great Southern Trucking Co. v. NLRB*, (4th cir.), 127 Fed. (2d) 180, at p. 186; *NLRB v. Whittier Mills Co.*, (5th cir.), 111 Fed. (2d) 474; *NLRB v. Gerity Whitaker Co.*, (6th cir.), Fed. (2d), June 1, 1942 (*Per curiam* opinion; facts set forth in 33 NLRB, No. 78); *Inland Lime & Stone Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 20, at p. 22; *Singer Mfg. Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 131, at pp. 136, 137 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *Wilson & Co. Inc. v. NLRB*, (8th cir.), 115 Fed. (2d) 759.

- (i) Attempting while negotiations are in progress to induce employees to leave the union, either by direct solicitation or by disparagement of the union:

NLRB v. Biles Coleman Lumber Co., (9th cir.), 98 Fed. (2d) 18, at p. 22 (Telling employees direct that union demands “impossible” and workers “better off if they paid no heed to outside organizers”); *NLRB v. Remington Rand, Inc.*, (2d cir.), 94 Fed. (2d) 862 (cert. den., 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540) (Taking of strike vote by employer to disprove union strike vote); *NLRB v. Acme Air Appliance Co., Inc.*, (2d cir.), 117 Fed.

(2d) 417 (Telling employees any contract would be with them and not with union); *NLRB v. New Era Die Co., Inc.*, (3d cir.), 118 Fed. (2d) 500 (Polling employees on closed shop issue immediately after request for bargaining); *NLRB v. Schmidt Baking Co.*, (4th cir.), 122 Fed. (2d) 162 (Telling employees employer would give them what union was asking on their behalf); *Great Southern Trucking Co. v. NLRB*, (4th cir.), 127 Fed. (2d) 180, at p. 186 (A “continued campaign during the period of the negotiations to induce withdrawals from the Union”); *NLRB v. The Blanton Co.*, (8th cir.), 121 Fed. (2d) 564 (Calling employees’ meeting to make “final declaration” of policy); *Colorado Fuel & Iron Corp. v. NLRB*, (10th cir.), 121 Fed. (2d) 165, at p. 175.

- (j) A refusal to negotiate in the mistaken belief that the Act did not cover the employer’s business:

NLRB v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014

NLRB v. Sunshine Mining Co., (9th cir.), 110 Fed. (2d) 780 (cert. den., 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118)

- (k) The making of a closed shop contract with a minority union at the time a majority union requests bargaining rights:

NLRB v. National Motor Bearing Co., (9th cir.), 105 Fed. (2d) 652

- (l) Delaying recognition while using “the time thus gained to coerce and intimidate enough of the members to withdraw from the union to deprive it of its majority”:

NLRB v. Dixie Motor Coach Corp., (5th cir.), Fed. (2d), at p. (May 27, 1942)

2. The employer must accord the representatives of his employees opportunity to present demands, to support them with discussion, and to learn the employer's position with respect to them.

Agreement between employer and employees on mutually acceptable terms is impossible so long as the terms on which the parties will insist are unrevealed. Each party must be given an opportunity to learn the terms on which the other party insists.

Consequently, the employer must make authorized spokesmen available at convenient places to participate in oral discussion of demands for so long as the possibilities of agreement have not been fully explored, and these spokesmen must reveal the employer's position as to employee demands, even if that position be no more than a refusal to agree to such demands.

Hence the courts have sustained findings of failure to bargain because of evidence of:

- (a) A refusal to meet and to negotiate otherwise than through an exchange of letters: *NLRB v. P. Lorillard Co.*, (6th cir.), 117 Fed. (2d) 921 (reversed on another point, 314 U. S. 512, 62 S. Ct. 397, 86 L. Ed. 358)
- (b) A failure to answer a request to meet for collective bargaining purposes and a failure to empower management representatives to negotiate: *Agwilines, Inc. v. NLRB*, (5th cir.), 87 Fed. (2d) 146 (See 2 NLRB 1, at pp. 15 and 16)
- (c) A refusal to meet or to deal with authorized representatives: *NLRB v. Remington Rand, Inc.*, (2d cir.), 94 Fed. (2) 862 (cert. den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540); *NLRB v. The Blanton Co.*, (8th cir.), 121 Fed. (2d) 564

- (d) A rejection of demands without explanation or discussion:

NLRB v. George P. Pilling & Son Co., (3d cir.), 119 Fed. (2d) 32; *NLRB v. National Seal Corp.*, (2d) cir.), 127 Fed. 776, at pp. 777 and 779; *NLRB v. Express Publishing Co.*, (5th cir.), 111 Fed. (2d) 588, mod'f'd 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930 (For the facts in detail, see 13 NLRB at p. 1213); *Inland Lime & Stone Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 20, at p. 22

- (e) A statement by an employer, after previously avoiding meetings, and after receiving a copy of union demands, that "he had nothing to discuss at this time": *M. H. Ritzwoller Co. v. NLRB*, (7th cir.), 114 Fed. (2d) 432, at p. 436
- (f) A refusal "to negotiate or discuss with the union questions involving the conditions of employment and the interpretation of the contract under which the parties were working": *Rapid Roller Co. v. NLRB*, (7th cir.), 126 Fed. (2d) 452, at p. 459
- (g) A statement by an employer, in refusing to agree to negotiate if proof of majority offered, that "he was opposed to a meeting with the Guild": *NLRB v. Clarksburg Pub'g Co.*, (4th cir.), 120 Fed. (2d) 976
- (h) A statement by an employer that he would "not discuss the scheduling of new rates except after they were put into effect": *NLRB v. Boss Mfg. Co.*, (7th cir.), 118 Fed. (2d) 187, at p. 189
- (i) A refusal to continue negotiations unless charges of unfair labor practices were withdrawn: *Hartsell Mills Co. v. NLRB*, (4th cir.), 111 Fed. (2d) 291

- (j) A refusal to continue negotiations in the mistaken belief that an impasse has been reached: *Jeffery-DeWitt Insulator Co. v. NLRB*, (4th cir.), 91 Fed. (2d) 134 (cert. den. 302 U. S. 731, 58 S. Ct. 55)
- (k) A refusal to discuss, or to negotiate regarding, the settlement of past grievances: *NLRB v. Bachelder*, (7th cir.), 120 Fed. (2d) 574, at p. 577 (cert. den. 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 79)
- (l) A refusal to show what existing practices as to seniority were: *Singer Mfg. Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 131 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549)
- (m) A refusal to negotiate further after a strike has been called: *National Licorice Co. v. NLRB*, 309 U. S. 350, at p. 358, 60 S. Ct. 569, at p. 574, 84 L. Ed. 799

3. The employer must agree to demands which are, in fact, acceptable, and must, if requested, embody mutually acceptable points in a binding, written trade agreement.

Prior to the Act, the employer had the right to fix the terms of employment unilaterally, and to change them as he saw fit. These terms constituted, in effect, individual contracts of employment with each employee. The Act makes these terms the subject of collective, rather than individual, agreement if the employees desire to bargain collectively. *The employer may still unilaterally decide the terms upon which he will insist*; but he must be willing upon demand to embody those terms in a written and signed contract.

In the absence of a contrary showing, the Board or Courts may assume that the terms presently in effect are the acceptable terms which the employer proposes to con-

tinue. Hence such terms must be embodied in a contract on demand:

“The bargaining agent * * * demanding no more as to wages, hours, and other conditions than what the employer has already granted and proposes to grant, the parties to the bargaining conference are in agreement.”

NLRB v. Knoxville Pub'g Co., (6th cir.), 124 Fed. (2d) 875, at p. 883

Other terms, which are in fact acceptable, must also be included.

Since a statement in advance of negotiations of an intent not to do what the law requires has the immediate effect of discouraging negotiations, such statements may in themselves constitute a refusal to bargain.

For these reasons a finding of failure to bargain collectively is supported by evidence of:

- (a) A refusal to agree to demands which were in fact acceptable:

NLRB v. Highland Park Mfg. Co., (4th cir.), 110 Fed. (2d) 632 (Employer refused “to make even an oral agreement regarding matters as to which there was no real disagreement”)

Globe Cotton Mills v. NLRB, (5th cir.), 103 Fed. (2d) 91 (See 6 NLRB at p. 466: employer rejected proposals “admittedly unobjectionable,” saying it “could see no reason for an agreement”)

Stonewall Cotton Mills, Inc. v. NLRB, (5th cir.), Fed. (2d) (June 3, 1942) (For facts, see 36 NLRB 240, at p. 263; employer refused to agree to maintain present wage scale even for 30 days)

NLRB v. Knoxville Publishing Co., (6th cir.), 124 Fed. (2d) 875 (Refusal to contract as to working conditions employer proposed to continue)

- NLRB v. Swift and Co.*, (6th cir.), 127 Fed. (2d) 30, at p. 31 (Employer objected to “clauses which would embody existing company policy” and refused “even to bind itself for a single day to continue the existing forty-hour week”)
- Inland Lime & Stone Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 20, at p. 22 (Rejection of contract *in toto* after expressing agreement “on several points”)
- Singer Mfg. Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 131, at p. 136, cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549 (“Petitioner was unwilling to contract with the United to do that which it had been in the habit of doing before United came into the shop”)

(b) A refusal to make any binding commitments with respect to wages and basic working conditions:

- NLRB v. Westinghouse Air Brake Co.*, (3d cir.), 120 Fed. (2d) 1004 (Wages and other working conditions “subject alone to the will of the company”)
- NLRB v. Swift and Co.*, (6th cir.), 127 Fed. (2d) 30, at p. 31 (Employer “would not agree to bind itself to anything relating to wages and hours”)
- NLRB v. Boss Mfg. Co.*, (7th cir.), 118 Fed. (2d) 187, at p. 189 (“As to matters covering wages, rates of pay, and working conditions, respondent stated it would not agree to them as these would interfere with management”)
- Singer Mfg. Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 131, at p. 136 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549) (The employer “insisted that the contract should provide that it might change its practice ‘whenever in its opinion such action seemed necessary’ and re-

fused a proposal that the agreement should provide for continuation of existing practice and modification thereof by either collective bargaining or arbitration”)

- (c) An announcement in advance of negotiations that the employer would never operate under a contract:
NLRB v. Somerset Shoe Co., (1st cir.), 111 Fed. (2d) 681

- (d) A refusal, after agreement is reached, to incorporate such agreement in a written, signed contract:
H. J. Heinz Co. v. NLRB, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309; *Bethlehem Shipbuilding Corp., Ltd. v. NLRB*, (1st cir.), 114 Fed. (2d) 930, at p. 941 (cert. den. 312 U. S. 710, 61 S. Ct. 448, 85 L. Ed. 1141); *NLRB v. Moench Tanning Co., Inc.*, (2d cir.), 121 Fed. (2d) 951; *NLRB v. Highland Park Mfg. Co.*, (4th cir.), 110 Fed. (2d) 632; *Ft. Wayne Corrugated Paper Co. v. NLRB*, (7th cir.), 111 Fed. (2d) 869; *Wilson & Co., Inc. v. NLRB*, (8th cir.), 115 Fed. (2d) 759; *Continental Oil Co. v. NLRB*, (10th cir.), 113 Fed. (2d) 473, at p. 481 (cert. granted on another point, 311 U. S. 861, 61 S. Ct. 72, 85 L. Ed. 406).

- (e) An announcement, in advance of negotiations, that the employer would not sign a contract:
NLRB v. Sunshine Mining Co., (9th cir.), 110 Fed. (2d) 780 (cert. den. 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118); *NLRB v. Hopwood Retinning Co.*, (2d cir.), 98 Fed. (2d) 97; *Art Metals Constr. Co. v. NLRB*, (2d cir.), 110 Fed. (2d) 148; *NLRB v. National Seal Corp.*, (2d cir.), 127 Fed. (2d) 776, at p. 779; *Hartsell Mills Co. v. NLRB*, (4th cir.), 111 Fed. (2d) 291; *NLRB v. Schmidt Baking Co.*, (4th cir.), 122 Fed. (2d) 162; *Stonewall Cotton Mills, Inc. v. NLRB*, (5th cir.), Fed. (2d)

(June 3, 1942) (for the facts, see 36 NLRB 240, at p. 259); *NLRB v. Louisville Refining Co.*, (6th cir.), 102 Fed. (2d) 678 (cert. den. 308 U. S. 568, 60 S. Ct. 81, 84 L. Ed. 477); *NLRB v. Boss Mfg. Co.*, (7th cir.), 118 Fed. (2d) 187, at p. 189; *NLRB v. Calumet Steel Division of Borg-Warner Corp.*, (7th cir.), 121 Fed. (2d) 366, at p. 370; *NLRB v. The Blanton Co.*, (8th cir.), 121 Fed. (2d) 564.

Every decision upholding a finding of failure to bargain has been supported by evidence of conduct which falls into one or more of the three categories outlined above. Sound reasons, backed by ample authority, show why the duty cannot be broadened. The three obligations of the employer, (1) to recognize the exclusive authority of the union, (2) to discuss terms and reveal positions, and (3) to agree to demands or terms which are in fact acceptable, thus comprise the duty to bargain as so far enforced by the Courts.

Failure to observe any one of these three obligations would make the attainment of a binding trade agreement as contemplated by the Act absolutely impossible. No other conduct would necessarily prevent agreement, and no other conduct is consequently proscribed.

B. The duty to bargain collectively leaves the employer with full liberty to decide the terms upon which he will agree.

(Arguing Specification of Error 8)

1. The duty to bargain collectively does not compel an employer to make concessions or changes in the status quo in answer to the demands of employees.

(Arguing Specification of Error 6)

The report of the Senate Committee upon the proposed act stated:

“ * * * The essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.”

S. Rep. 573, 74th Cong., 1st Sess. (1935), p. 12
During the debates, Senator Wagner himself said:

“It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.”

Cong. Rec.—Senate, Vol. 79, No. 101, p. 7852
(May 5, 1935)

Naturally, then, the courts have interpreted the Act to give effect to the Congressional intent:

“The Act does not compel agreements between employers and employees. It does not compel any agreement whatever.”

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893

By necessary logic, if the duty to bargain does not compel the making of agreements on a basis which is not satisfactory to the employer, it does not compel the making of concessions from the *status quo*. During the Senate debates, Senator Walsh said of the bill:

“It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreements; he can say, ‘Gentlemen, we have heard you and considered your proposals. We cannot comply with your request’, and that ends it.”

Cong. Rec.—Senate, Vol. 79, No. 102, p. 7959
(May 16, 1935)

Mr. Connery, Chairman of the House Committee reporting the bill, similarly explained the duty to bargain:

“The gentlemen may say: ‘I will not give you the 10 cents an hour increase you ask’. There is nothing you can do then. Nobody asks that you be made to

give them 10 cents an hour. This bill just compels you to deal with the men collectively. You must sit across the table and talk things over with them."

75 Cong. Rec. 9685 (1935)

Consistent with the Congressional intent evidenced by these passages, the Courts have explicitly held that changes in the *status quo* are not compelled.

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893, the Supreme Court remarked that the Act compels neither agreements nor "adjustments"

In *NLRB v. Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, the Supreme Court held that the employer was under a duty to bargain respecting the true interpretations of an existing contract. Nevertheless, when the employer "desired to operate its machine shop in accordance with its honest understanding of the contract" and "stated its views to the committee" of its employees, it did not fail to bargain, despite the Board's finding that "it was inconceivable that the employees would have accepted the company's construction of the contract" and that the employer

"realized that it had no alternative but to operate the plant in the way the men dictated, * * * or keep it closed entirely, or have a strike."

The *Sands* case thus holds that an employer, even though he knows a strike will result, does not fail to bargain collectively when he "stands pat" on his interpretation of an existing contract, or, in other words, when he refuses to grant a concession from what he believes to be the *status quo*.

The Circuit Courts have been equally explicit:

"The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them. * * *"

Art Metals Constr. Co. v. NLRB, (2d cir.), 110 Fed. (2d) 148, at p. 150

This language was not only quoted with approval in *NLRB v. Highland Park Mfg. Co.*, (4th cir.), 110 Fed. (2d) 632, at p. 639, but was quoted by this Court as stating the correct rule in *NLRB v. Sunshine Mining Co.*, (9th cir.), 110 Fed. (2d) 780, at p. 788 (cert. den. 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118). Other holdings to the same effect are these:

“A formal counterproposal to embody in a contract the Mills’ then established wages and hours (with its outstanding promise as to shorter hours), and its established policy as to child labor, and seniority subject to circumstances, would have put beyond question the Mills’ willingness to comply with the Act.”

Globe Cotton Mills v. NLRB, (5th cir.), 103 Fed. (2d) 91, at p. 94

“It (the employer) was required to meet its employees with an open mind, and, if it was unwilling to do more than maintain its present status, to say so, and to express a willingness to have that as the agreement between them.”

NLRB v. Express Publishing Co., (5th cir.), 111 Fed. (2d) 588, at p. 589 (mod’f’d, but without comment on this point, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930)

“ * * * The questioned contract falls into two general classifications; one, the provisions requiring the respondent to agree to wages, hours, and other conditions of employment, which did not exist at the time these procedures were instituted, nor exist at the present time. Over these the decree and the statute have no control.”

NLRB v. Knoxville Pub’g Co., (6th cir.), (Jan. 16, 1942), 124 Fed. (2d) 875, at p. 882

“Petitioner could not be compelled to enter into a contract which did not reduce wages or which bound it not to make a reduction in the future.”

Singer Mfg. Co. v. NLRB, (7th cir.), 119 Fed. (2d) 131, at p. 137 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549)

If the duty to bargain does not compel an employer to make concessions, a finding of failure to bargain collectively cannot be supported by evidence of a refusal or failure to make concessions. An order to bargain supported only by evidence of a failure to make concessions is nothing more nor less than an order to make concessions. This the law does not permit.

- 2. The duty to bargain collectively does not compel an employer to make any formal counterproposals to union demands so long as, by explanation of his position in answer to union demands or otherwise, he makes known the terms on which he will insist.**
(Arguing Specification of Error.7)

Some of the decisions refer to the making of “counterproposals”. The word “counterproposal” may mean different things to different people: (a) counter-demand; (b) an offer of a compromise or concession; or, (c) simply an exposition of the terms on which the bargainer will insist.

Since the Act does not require the making of concessions, an employer is not required to make counterproposals which are concessionary in character. Likewise, the Act does not require an employer to make counterdemands upon his employees. However, the Act does require an employer to explain his position. In this last sense, and in this sense alone, the Act may be said to compel “counterproposals”.

If, therefore, an employer makes known the terms on which he will insist, he has made known his "counter-proposal". The law, of course, does not care whether the employer so labels his statements of position; the law is concerned only with the substance of what he does. The law is concerned solely with the avoidance of misunderstanding, and that is fully avoided if the employer communicates his terms.

Nor is the law concerned with the form or manner in which the terms are communicated:

"Of course, respondent was not bound to make any agreement, and technically it was not bound to make a counter proposal. * * * "

NLRB v. Express Pub'g Co., (5th cir.), 111 Fed. (2d) 588, at p. 589, (mod'f'd on another point, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930)

An employer may even verbally deny that he has a "proposal" to make:

"In response to the question whether Mr. Lightner made any proposal for ending the difficulty * * * the witness replied, 'He made no definite proposal at all' * * * We are of the opinion that there is no substantial evidence to support a finding that respondent had refused to bargain collectively * * * prior to the meeting of October 7. * * * "

NLRB v. Lightner Pub'g Corp., (7th cir.), 113 Fed. (2d) 621, at p. 625

Mr. Justice Wilbur expressed the same thought in his dissenting opinion in *NLRB v. Carlisle Lumber Co.*, (9th cir.), 94 Fed. (2d) 138 (cert. den., 304 U. S. 575, 58 S. Ct. 1045, 82 L. Ed. 1539), in discussing an issue not involved in the majority opinion:

"The law does not purport to require that the collective bargaining shall result in an agreement. It does require and seeks to establish the right of the employees to bargain through their chosen representatives, and *if an agreement is arrived at*, to 'make a

collective agreement'. When the employer has met these representatives and listened to their proposition, the employer is not required to make counter proposals. A refusal to make such proposals or to accept the proposed agreement is clearly the constitutional right of the employer. * * * if made as a result of or after meeting the representatives of the employees." (pp. 150-151. Italics added.)

Both logic and precedent lead to the same conclusion. When the union demands a wage increase, and the employer says "no", his failure to offer a compromise supports the presumption that he proposes to continue the existing wage rates. Presuming, also, as the law does, that the employer intends to obey the law, he has by clear inference stated the terms on which he will insist and has made his "counterproposals". He is under a duty to explain what the *status quo* is, but he is not compelled to offer more, and he is presumed to offer that.

3. The duty to bargain collectively does not imply a power in the Board or the Courts to pass judgment on the reasonableness of the terms which the employer is willing to accept.

The Senate Committee report said explicitly:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or *to permit governmental supervision of their terms*".

S. Rep. 573, 74th Cong., 1st Sess. (1935), p. 12.
(Italics added)

Senator Wagner said the same thing: Cong. Rec., Vol. 79, No. 101, p. 7852 (May 5, 1935). Senator Walsh, supporting the bill during debate, said:

"*The bill does not go beyond the office door.* It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and

solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded. * * *

“What happens behind those doors is not inquired into and the bill does not seek to inquire into it.”

Cong. Rec., Vol. 79, No. 102, p. 7959 (May 16, 1935) (*Italics added*)

The debates in the House evidence a similar intent. (*Cf.* the remarks of Representatives Griswold and Walsh, 79 Cong. Rec., 1935, pp. 9682 and 9711.)

The Courts have interpreted the Act in accordance with the Congressional intent so evidenced. Upon charges of violating an order to bargain collectively, the Fifth and Sixth Circuit Courts of Appeals have said:

“The respondents did not ask a single thing of the union that it could not, if it wanted to, have agreed to. The same thing is true of the demands of the union made upon the respondents. It is not for us to determine whether the proposals of the union or those of the respondents would have been best for employer and employee.”

NLRB v. Whittier Mills Co., (5th cir.), 123 Fed. (2d) 725, at p. 728 (*Italics added*)

*“Neither the statute nor the present decree require respondent to make a collective contract hiring individuals on any terms other than it may by unilateral action determine. * * *”*

NLRB v. Knoxville Pub'g Co., (6th cir.), 124 Fed. (2d) 875, at p. 883

“To sustain this petition and issue a contempt order under this record could mean only one thing, in effect, that the respondents were found in contempt for not agreeing to the check off, because it was upon this rock that the negotiations finally split. It was because of this that the union broke off and refused to continue negotiations. The law does not authorize the Board or us to make collective bargaining contracts nor to prescribe what shall be written in them.”

NLRB v. Whittier Mills Co., (6th cir.), 123 Fed. (2d) 725 at p. 728

This is the only possible holding consistent with the intent of Congress. This is the only possible holding consistent with the philosophy well stated by this Court in the following passage:

“The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. * * * The Act does not vest in the Board managerial authority.”

NLRB v. Union Pacific Stages, (9th cir.), 99 Fed. (2d) 153, at p. 177

The Act leaves to the employer full liberty to decide what terms he will insist upon in his bargaining with his employees. This liberty marks the limits of the duty to bargain. The duty to bargain is to recognize the union, to negotiate with it, and to agree if mutually acceptable terms are discovered; the duty is to do nothing or say nothing which would make agreement on those terms impossible. The employer is under no duty to agree to unacceptable terms, and his failure to do so is no evidence of a failure to bargain, whatever opinion the Board may have as to the reasonableness of the employer's position.

C. The “good faith” which the duty to bargain collectively is sometimes stated to involve does not enlarge the scope of the duty.

1. The “good faith” to which the Courts have referred is no more nor less than a willingness to enter into a binding trade agreement on mutually acceptable terms if any are discovered.

The Courts have sometimes said that the duty to bargain must be performed “in good faith”. While “good faith”, without further definition, is a nebulous concept, the Courts mean something quite specific: “negotiate in good faith with the view of reaching an agreement if possible” (*NLRB v. Highland Park Mfg. Co.*, (4th cir.), 110 Fed. (2d) 632, at p. 637), “negotiate in good faith

with the view of reaching an agreement'' (*NLRB v. P. Lorillard Co.*, (6th cir.), 117 Fed. (2d) 921, at p. 924); "negotiate in good faith with the purpose of coming to an agreement if possible'' (*Continental Oil Co. v. NLRB*, (10th cir.), 113 Fed. (2d) 473, at p. 480).

What is prohibited is a "mind * * * hermetically sealed against the thought of entering into an agreement'' or "a fixed intention not to agree with any proposal, irrespective of whether the proposed terms were otherwise acceptable'' (*NLRB v. Boss Mfg. Co.*, (7th cir.), 118 Fed. (2d) 187, at p. 189).

The "good faith'' thus required of an employer in bargaining is no more nor less than an intention or willingness to discover what terms, if any, are mutually acceptable, and to contract on the basis of such terms.

2. The only conduct which would support an inference that the employer was unwilling to contract on mutually acceptable terms is conduct which would amount in any event to a breach of the obligation as already defined.

"Good faith'', so defined, does not enlarge the field of evidence which is substantial enough to support a finding of failure to bargain.

Good faith, as an intent not to agree on any terms, must be, unless expressly stated, at most an inference. Before any inference can be drawn by an administrative body, evidence must be introduced

"affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established."

NLRB v. Columbian Enameling & Stamping Co.,
306 U. S. 292, at p. 300, 59 S. Ct. 501, 83 L. Ed.
660

Furthermore, in all litigation, whether civil or criminal, the law starts with the presumption that every man has obeyed it: *Bank of the U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, at pp. 69 and 70.

Under these circumstances, evidence of conduct in which an employer has the liberty to engage cannot amount to a "substantial basis of fact" from which an illegal intent "can be reasonably inferred".

If an intent or willingness to agree is required by the Act, the law will presume that an employer possesses such an intent or willingness unless substantial evidence to the contrary is advanced. The only evidence which would reasonably support a contrary inference would be evidence of conduct clearly inconsistent with such presumed willingness to agree.

The only conduct which would be inconsistent with the presumption of a willingness to contract on acceptable terms would be conduct which amounted to a refusal to take some steps necessary to such agreement. If the record shows recognition of the exclusive authority of the union, full exposition of the terms on which the employer will insist, and acquiescence in terms mutually acceptable, the record has excluded the possibility that the employer has by his conduct made agreement impossible.

This argument has judicial sanction as well as logic to support it. Evidence of conduct which is no more than the exercise of the liberty left to the employer by the Act to decide unilaterally upon the terms which will be acceptable to him has been held insufficient to support an inference of "bad faith":

"Respondent rejected this article in its entirety. It was not compelled to contract for an increase in the salary of its employees and no inference of bad faith can be drawn from this rejection."

NLRB v. Knoxville Pub'g Co., (6th cir.), 124 Fed. (2d) 875, at p. 880

Logically, then, the only evidence which would substantially support a finding of lack of good faith is evidence of conduct which would constitute a breach of the duty as we have already defined it.

II.

The Order to Bargain Collectively Must Be Set Aside Because the Undisputed Facts, As Found By the Board, Show Affirmatively That Wards Fulfilled Its Duty to Bargain Collectively.

(Arguing Specifications of Error 1 and 2)

If the definition of the duty to bargain which is here advanced be the correct one, then the very facts found by the Board demonstrate affirmatively that Wards fully performed its duty to bargain collectively.

A. Wards recognized the exclusive authority of the Unions to speak and contract on behalf of all Wards' employees in the proper units.

Wards never challenged the Warehousemen's majority after certification. As to the Clerks, while Wards had not, at the time of the negotiations, recognized the propriety of the unit claimed, it had, in the words of the Board, "negotiated jointly with the Retail Clerks and the Office Employees' Union" (R. 29-30) and

"During the negotiations the respondent did not dispute, and in fact accepted, the majority claim made by the Retail Clerks" (R. 32).

Wards' good faith is borne out by its willingness to forego proof of majority:

"The respondent agreed to accept the Retail Clerks' statement that it represented a majority of the clerks" (R. 35).

(Note that, despite the dispute over the proper unit, no question of representation was raised even after the strike had taken place, and a majority of the Clerks had remained at work: Ward's Ex. 21, R. 750).

B. Wards entered into a full discussion of Union demands, explained its own position, made known the terms on which it would insist, and participated in a discussion full enough to avoid the possibility of any misunderstanding.

Barr's instructions to Powell on October 11 were

"We stand ready to discuss with the Union each of their demands and to explain clearly and frankly the Company's position in regard to each demand. You may further tell the Unions that they can consider your statement of the Company's position as a counterproposal if they desire; * * * " (R. 35; see R. 626-7).

Again, on November 22, Barr wrote Powell:

"Bargain in good faith. State the Company's position on the points raised honestly and frankly. Your statement of position may or may not, contain what might be considered a counterproposal" (R. 45; see R. 736).

The Board's findings show that Powell carried out his instructions faithfully.

"At the October 22 meeting, the parties got no further than a discussion of the union-shop clause" (R. 36).

Powell told Dixon of the Clerks:

"* * * Our counterproposal would be that the work of organizing the employees be done by the Union" (R. 36).

On November 12, dealing with the Warehousemen, "each of the 14 articles was discussed, with Powell setting forth the respondent's position on each article" (R. 38). Powell "submitted a list containing the minimum rates of wages then being paid by the respondent to its warehousemen, and stated that no changes would be made in the existing rates" (R. 40).

On December 13, with both Unions present, Powell told them:

“that our proposal or demand at present was that the picket lines be removed and that the employees be allowed to return to work” (R. 50).

Powell added:

“nor did the Company intend to make any other demands on the Union” (R. 50).

On December 14th, Powell, when asked if he had “a proposal to submit that might provide a basis for an agreement” replied that Wards “had nothing further to submit than the statement of its position in regard to each of the proposals theretofore submitted” (R. 51). Powell thus made it clear that Wards’ statement of position constituted the terms on which it would insist.

On December 16,

“* * * They proceeded to discuss the entire contract proposed by the Warehousemen. A similar procedure was followed with respect to the proposed contracts of the Retail Clerks and the Office Employees’ Union” (R. 53).

The Board found:

“Pursuant to its hypertechnical approach, the respondent was willing to meet with the Unions when requested, listen to their demands, and explain its position thereon. Further than that it refused to do * * *” (R. 63).

Thus the Board admits that Wards participated in a discussion which permitted both sides to expound their position fully, and which left no room for mutual misunderstanding as to the terms on which the parties were insisting.

C. Wards agreed to demands which were, in fact, acceptable.

The Board described the ending of the last of the bargaining session in these words:

“At the close of the conference, Ashe stated that the clauses of the contracts to which the respondent objected primarily were those providing for any union shop, any increase in wages, a seniority rule, or any form of arbitration, and stated further: ‘We aren’t getting any place; we might as well call it quits’” (R. 54).

Thus the substantial issues all involved demands for a change in the *status quo*.

The Board notes that, at the meeting of November 12,

“Powell did indicate tentative acceptance of some articles of minor importance with certain modifications, particularly when the terms as agreed to would not conflict with the *status quo*” (R. 38).

The Board thus recognizes the clearly evidenced willingness of Wards to agree on *status quo* terms.

D. Wards never was asked to embody acceptable terms in a written, signed contract.

No demand was ever made that Wards agree to and sign a contract embodying only acceptable demands. Wards never refused to do so.

E. Wards’ willingness to enter into an agreement is evidenced by its willingness to make concessions from the status quo, which it was not compelled by law to make.

The Board recognizes this, but belittles it:

“The only concessions made by the respondent, with possibly three exceptions, were such as would not alter the *status quo*” (R. 53).

The Board in a footnote states as to those three “exceptions”:

“There was no showing whether or not the respondent’s agreement to these matters in any way altered the *status quo*” (R. 53).

although reciting Powell’s testimony that “some minor concessions” were made. Obviously, all “concessions” represent changes from the *status quo*, and the Board’s quibble illustrates the biased character of its fact-finding procedure.

The Board’s own findings thus show affirmatively that Wards discharged its statutory duty to bargain collectively. Again quoting from Mr. Justice Wilbur’s dissenting opinion in the *Carlisle Lumber* case:

“We have thus a number of instances in which the respondent met with the committee of the union for the purpose of discussing the propositions advanced by the union. *This is collective bargaining per se.*”

NLRB v. Carlisle Lumber Co., (9th cir.), 94 Fed. (2d) 138, at p. 150, (cert. den. 304 U. S. 575, 58 S. Ct. 1045, 82 L. Ed. 1539).

As this Court has pointed out elsewhere, the provisions of the Act are not to be construed

“As compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.”

NLRB v. Union Pac. Stages, (9th cir.), 99 Fed. (2d) 153 at p. 177.

The Board’s finding that Wards failed to bargain collectively either totally disregards these undisputed facts or else is based on a misunderstanding of the nature of the duty to bargain.

III.

None of the Nine Respects in Which the Board Found Wards Had Failed to Bargain Collectively Amount to Substantial Evidence of a Refusal By Wards Either to Recognize the Authority of the Union, Or to Discuss the Union Demands Fully, Or to Make Binding and Written Trade Agreements on Acceptable Terms.

In its "Concluding Findings" on the bargaining issue, the Board said:

"We are of the opinion that the respondent failed in a number of respects to comply with its obligation to bargain collectively" (R. 58, 59).

The seven succeeding paragraphs enumerated nine such "respects". Making the fair assumption that these nine points recapitulate the strongest evidence in the record on which the Board's findings might be predicated, we propose to show that not one of them substantially supported the Board's findings.

The first, second, sixth, and ninth points described conduct which the Board regards as amounting to a violation of duty *per se*, while the other points were treated merely as evidence of want of good faith. The Board's final conclusion, after "reviewing the whole congeries of events", was that Wards did not "confer and negotiate sincerely * * * with an open mind and a sincere desire to reach an agreement" (R. 68).

We propose to show under this proposition III:

- (a) that the Board misinterpreted the Act in holding, as to its points one, two, six and nine, that the conduct to which they refer constituted a breach of duty *per se*;
- (b) that the Board misconstrued the scope of the duty imposed by the Act in its appraisal of the evidence covered by its nine points of conclusions;

- (c) that none of the nine points referred to conduct which substantially supports any inference that Wards lacked that good faith willingness to contract on acceptable terms which the Act requires.

A. The Board in its first three points erroneously assumed that Wards was under a duty to agree to do what the law compelled it to do in any event.

(Arguing Specifications of Error 3, 4, and 5)

The first respect in which the Board found Wards to be disobedient was that Wards, "although requested to do so, did not agree to embody understandings that might be reached with the Unions in signed contracts" (R. 58). The phrase "did not agree" carries implications which the facts do not justify. Wards, when twice asked in advance of any agreement whether it would sign a written contract, merely replied that "the question of the form of agreement * * * is premature" (R. 34, 59-60, and 757). The Board held this to be *per se* a violation of the Act because it was "tantamount to a refusal to bargain altogether" (R. 60).

The Board's second point was that, while Wards offered to assert its recognition of the Union in a "preliminary whereas clause", it "refused to agree to a clause * * * by which the respondent *promised* to recognize it as exclusive representative" (R. 61, italics added). The Board also held this to be a breach of duty *per se*, construing the law as placing on Wards an "obligation to 'bind itself to give exclusive recognition'" (R. 61).

The Board's third point was that Wards' refusal to insert in the proposed contracts a promise not to discriminate against Union members because of Union activity "demonstrated its refusal to bargain collectively" (R. 62).

1. All three promises which were supposedly refused were promises to do that which the law compelled Wards to do in any event.

In *H. J. Heinz Co. v. NLRB*, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309, the Supreme Court held that under the Act an employer is no longer free to refuse to embody agreements reached in a signed contract "on the request of the Union" (311 U. S. at p. 526). When Wards was asked on December 14 whether it "would be willing to sign an agreement which merely set out its present policies and practices" (R. 757), the Unions had not indicated that they would accept such terms. The question at most was a hypothetical inquiry as to whether, under circumstances not then appearing likely to occur, Wards would obey the law. Wards properly pointed out that the question was "premature" (R. 757). If this be "a refusal to agree" as the Board called it, it was at most a refusal to agree *in advance* to do what the Act might later command.

The so-called "refusal" of Wards to "bind itself to give exclusive recognition", was also at most the refusal *to agree to do* what the Act itself compelled Wards to do through the operation of sections 8 (5) and 9 (a), and *which Wards had already done in fact*.

Wards objected to an anti-discrimination clause, on the express ground that the matter was "covered by law and is not a subject of agreement" (R. 61; see R. 740 and R. 765). The clause objected to added nothing to the obligation imposed by section 8 (3) of the Act.

2. The law vests no right in, nor imposes any obligation upon, an employer to bargain with respect to the duties which the law independently places upon him, and hence imposes no obligation to agree to do what the law compels him to do in any event.

Obviously, duties imposed upon an employer by law, which he must in any event perform, and which he has not unilaterally and voluntarily determined to be satisfactory, are not terms to be arrived at by negotiation or bargaining. Asking an employer to agree to do what he is already bound to do is patently absurd.

The Fifth Circuit Court of Appeals has said:

“ * * * The subject matter of collective bargaining is rates of pay, wages, hours of employment, or other conditions of employment. A refusal to bargain about legislative policies and other generalities is not included.”

Globe Cotton Mills v. NLRB, (5th cir.), 103 Fed. (2d) 91, at p. 94.

In *McQuay-Norris Mfg. Co. v. NLRB*, (7th cir.) 116 Fed. (2d) 748, at p. 751, (cert. den., 313 U. S. 565, 615 S. Ct. 843), 85 L. Ed. 1524), the Seventh Circuit Court of Appeals was very explicit:

“In the first place, the recognition required by 9 (a) is not a bargaining matter, as petitioner sought to make it.”

This is the very case which the Board cites as authority for its contention that Wards was under a legal obligation to “bind itself” to recognize the Union (R. 57)!

A reasonable man, entering into a contract, would object to cluttering it with unnecessary clauses promising to do what will have to be done in any event. The Act did not contemplate, nor does it compel, the making of agreements which do not help to stabilize the terms and conditions of employment.

B. The Board's first three points as to Wards' supposed refusals to agree to do what the law compelled it to do furnish no support for an inference that Wards was unwilling to contract with the Unions on the basis of mutually acceptable terms.

- 1. No inference that Wards was unwilling to embody agreements reached in a written contract or that Wards' public announcement that it would do so was untrue can be drawn from Wards' insistence that the question of the form of any contract was premature before a meeting of minds had occurred.**

The only two times the question of a written contract was raised were (a) on September 19, (R. 58) before acceptance of the claim of the Clerks to represent a majority on October 7th (R. 679); and (b) on December 14, (R. 757—not on Dec. 16, as stated by the Board, R. 58), after charges of failure to bargain had already been filed (R. 273 and R. 1). The question was obviously “premature” on September 19; and was obviously asked on December 14 for the purpose of entrapment. Wards' answer on December 14 simply reflects Wards' realization that the question was not asked by the Unions in good faith, since it related to *status quo* terms which the Union had consistently rejected.

Even if it stood alone, Wards' conduct in no way suggested that Wards was unwilling to sign a contract if mutually acceptable terms were agreed upon, and if the Union then requested it. Conduct not dissimilar has been approved by the Board itself:

“We believe, however, that where further negotiations are contemplated, it is not inconsistent with the duty imposed by the Act to decline to enter into a written contract prior to the reaching of an accord as to all the basic terms then the subject of consideration.”

In re Allied Yarns Corp., 26 NLRB, at p. 1451.

On the other hand the presumption that Wards intended to obey the law is corroborated by other uncontradicted evidence in the record:

- (a) Powell wrote on November 13 to Barr, mentioning "the Court decisions which require that an employer is obligated to sign an agreement where he has reached a verbal agreement with the Union" (R. 744) and questioning whether the same logic required the submission of counterproposals in writing.
- (b) During the negotiations Wards discussed the form and wording of a possible agreement at great length. Powell's repeated suggestions that Union recognition be recited in a preamble rather than set forth as an article in the agreement (R. 737, 761-2, 556) are meaningless if a written contract were not contemplated. Powell also suggested verbal changes in several of the proposed contracts (R. 556, 557, 558, 531, 533, 738, 739, 741, 762, 764, 766, 768, 769), Powell objected to certain clauses only "as written" (R. 146).
- (c) Some time before the hearing, Wards published a newspaper notice affirming its willingness to reduce any agreement reached to written form (Ward's Ex. 11, R. 651). *The Board omits to mention this undisputed fact in its findings.*
- (d) Wards signed a contract with another A. F. of L. union at another location shortly after negotiations at Portland had reached an impasse (R. 705). *Wards had no policy against signed agreements.*

In the face of these uncontradicted facts, any inference that Wards, because it insisted that the form of any agreement was "premature", was negotiating "with its mind hermetically sealed against the thought" of entering into a signed agreement is absurd.

2. Even if the Board could infer that Wards did not intend to enter into a written contract, no inference can be drawn that such intent affected the negotiations in any manner; nor could any inference be drawn that Wards was unwilling to agree on acceptable terms.

The law never punishes a state of mind alone, but it punishes conduct resulting from or associated with that state of mind. The law never punishes a man who intends to steal a certain necklace should an opportunity occur unless he actually avails himself of such an opportunity; but the law considers the *animus furandi* as one of the elements of the crime when actually committed.

Consequently, the intent of an employer not to rehire an employee who has testified against it before the Board does not constitute a violation of Section 8 (4) of the Act unless the Employer, acting upon his intent, actually fails to rehire the employee when opportunity offers:

“It is sufficient to say that the employer was never called upon to make this particular choice, and that no unlawful discrimination actually occurred. The National Labor Relations Act is not concerned with hypothesis, but with realities; it does not seek to prohibit an evil intent but unfair labor practices.”

F. W. Poe Mfg. Co. v. NLRB, (4th cir.) 119 Fed. (2d) 45 at p. 48.

By the same logic, the Act does not punish an employer for an intent not to bargain unless he fails to bargain when the occasion to bargain actually arises. Even if Wards did not intend to sign a written contract embodying the terms discovered to be mutually acceptable, it was never called upon to do so, nor did it announce in advance of negotiations that it would never do so. Hence, a mere finding of the existence of an intent not to do so would not support a finding that Wards had failed to bargain.

Nor could the Board infer from such an intent that Wards also did not intend to come to any agreement whatsoever. This would be basing one inference upon another in the most vicious fashion.

3. No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' insistence that the fact of recognition should be recited in the preamble to the contract rather than made a subject of agreement.

“ * * * a signed contract or a statement in writing * * * serves both as a recognition of the union and as a permanent memorial.”

NLRB v. Knoxville Pub'g Co. (6th cir.), 124 Fed. (2d) 875 at p. 882.

A fortiori the recitation of recognition in a preamble to a contract serves the same purpose.

4. No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' refusal to agree not to discriminate against union members for union activity.

(Arguing Specification of Error 11)

In holding that Wards' refusal was “without cause” and not “what reasonable and fair minded men are ordinarily willing to do” (R. 62), the Board clearly exceeded its powers by attempting to pass judgment on the “reasonableness” of Wards' position.

In any event, Wards' position was, by no test, unreasonable. The Union's express reason for asking for the clause was so specious as to make the demand obviously insincere; “a lot of the Union members did not know of a similar provision in the Wagner Act” (R. 765). No one today is so naive as to believe that Unions conducting organization campaigns leave any employee unacquainted with his rights.

C. The Board's fourth, fifth, and sixth points are based on the Board's misinterpretation of the duty to bargain as compelling Wards to offer concessions to union demands.

The Board prefaced its "Concluding Findings" with a definition of the duty to bargain which revealed that the Board believed that an employer must be willing to make concessions to union demands. This second erroneous interpretation of the law is the basis of the next three criticisms which the Board directs against Wards' bargaining tactics.

1. The Board's express definition of the duty to bargain includes a "willingness" to make concessions.

Saying (R. 54) that "the scope of the duty appears from our decision in *Matter of Singer Mfg. Co.*" (24 NLRB, on p. 444), the Board quotes the following passage from its opinion in the *Singer* case:

"The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented" (R. 55-6).

To this sentence, the Board appended a footnote, saying:

"Manifestly, in explaining the possibilities of reaching an agreement the open and fairmindedness and sincerity of purpose required by the Act contemplates an interchange of ideas, the communication of facts peculiarly within the knowledge of either party, personal persuasion, and *willingness to modify demands in accordance with the total situation thus revealed.*" (R. 56, italics added)

Obviously, the "open and fair mind" and "sincere purpose" which the Board would require of an employer must, in the Board's opinion, be demonstrated by "a willingness to modify demands". Such a willingness can of course be demonstrated only by the making of concessions.

2. The Board's fourth point, criticizing Wards' supposed "negative attitude", referred to Wards' interpretation of the Act as imposing no affirmative duty to offer concessions from the status quo.

Referring to three statements by Wards as to its interpretation of the duty to bargain, the Board said:

"The respondent's declarations abundantly disclose an attitude inconsistent with its obligation actively to cooperate with the Unions" (R. 62).

The first declaration criticized was: "It is the union, not the Company, which is seeking an agreement". This statement is taken from Barr's answer of November 22 (Ward's Ex. 18, R. 733 *et seq.*) to Powell's request for guidance on the question of counterproposals, and followed these earlier comments:

"We propose to fulfill our obligation to bargain with the Unions in good faith, but this does not pass to us 'the burden of going forward'. The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our relative positions of such a nature as to induce us to seek some concession from the union" (R. 733-4).

Barr obviously meant that the Unions, not the company, were asking for changes in the *status quo*. In that sense, the initiative certainly lay with the Unions.

The second "declaration" was Powell's supposed statement that "his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company" (R. 62). In the light of Barr's instructions, Powell clearly was referring to Wards' consistent position that it was not going to make concessions from the *status quo* unless the Union demands were acceptable to it. Certainly Wards

did assume the affirmative duties which the Act imposes, such as recognition and negotiation.

The third "declaration" (R. 62-3) was a passage from Wards' brief before the Board setting forth the same arguments as to the nature of the duty to bargain as are set forth in this brief. *The Board's use of a legal argument by counsel as support for a finding that the latter's client had acted wrongly is unprecedented.*

3. The Board's fifth point, that Wards was "opposed to submitting to the Union's genuine counterproposals", identifies "genuine counterproposals" with proposals of concessions.

The Board admitted that Wards

"was willing to meet with the Unions when requested, listen to their demands, and explain its position thereon" (R. 63).

But, to the Board, this was not enough:

"Further than that, the respondent refused to go, and it persisted, rather, in the view that the obligation of taking further steps rested upon the Unions alone. Thus the respondent was opposed to submitting to the Unions genuine counterproposals" (R. 63).

Since to "explain its position" on Union demands was to state the terms on which Wards insisted, the duty to go "further than that" by making "genuine counterproposals" was no more nor less than the duty to offer concessions from the terms upon which Wards originally insisted.

4. The Board's sixth point, that Wards rejected union demands because "they were not consonant with company policy or practice" is based solely on Wards' insistence on the maintenance of status quo terms.

The next paragraph of the Board's conclusions reads:

"Also illustrative of the respondent's bad faith in the negotiations is its repeated rejection of the union proposals on the general ground that they were not consonant with company policy or practice. We are satisfied upon this record that the respondent, *in thus relying simply on existing practice as a reason for not agreeing to union proposals*, failed to fulfill its obligation to discuss freely and fully their (the parties') respective claims and demands and, when these are opposed, to justify them on reason" (R. 65-6, italics added).

The Board could not have meant that Wards did not advance reasons why it did not offer concessions. Without attempting an exhaustive analysis, undisputed evidence in the record demonstrates beyond the shadow of a doubt that Powell spent much time advancing: (a) his *reasons* for Wards' opposition to the closed shop (R. 738, 820, 821); (b) his *reasons* why the nature of the business affected overtime (R. 738, 763); (c) his *reasons* why the company could not pay higher wages (R. 739, 756, 757, 758, 763, 764, 769, 770); (d) his *reasons* why the company could not agree to arbitration of discharges (R. 740, 765); and (e) his *reasons*, due to the nature of the business, why the holiday pay demand had to be modified (R. 742, 763).

Obviously, then, the Board meant that Wards failed "to fulfill its obligation" because it insisted upon the maintenance of existing practices.

D. The Board's fourth, fifth, and sixth points furnish no support for an inference that Wards was unwilling to contract with the Union on the basis of mutually acceptable terms.

(Arguing Specification of Error 12)

- 1. No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' belief or assertion that it was under no duty to offer concessions to Union demands.**

Since the record clearly shows that Wards took those "affirmative" steps—recognition, negotiation, explanation, and discussion—which the Act requires, what Wards said as to its interpretation of the Act is no more at best than evidence of an intention not to take other "affirmative" steps, such as making counter-demands upon the Union or offering concessions to the Union demands. This intention is not forbidden by the Act, however much it may differ from the Board's philosophy of labor relations.

The admitted facts are, that Wards, while under no legal compulsion to do so, did in fact offer certain concessions, however much the Board belittles them.

- 2. No inference that Wards was unwilling to agree to acceptable terms can be drawn from Wards' belief that the Act did not compel it to label its statements of position as "counterproposals".**

Barr instructed Powell on October 11th:

"* * * explain clearly and frankly the Company's position in regard to each demand. You may further tell the Unions that they can consider your statement of the Company's position as a counterproposal if they desire" (R. 626-7).

Again, Barr told Powell on November 22nd:

“* * * we should not be unduly concerned over whether or not our statement of position contains what might be considered a counterproposal. * * * State the Company’s position on the points raised honestly and frankly. Your statement of position may or may not contain what might be considered as a counterproposal” (R. 734).

Whether or not Wards ever labelled its position a “counterproposal”, the fact remains, as was pointed out under Proposition II, that Wards made known to the Unions the terms on which it insisted. No inference of “bad faith” can be drawn from the fact that Wards may not have called its statement of position by the name of “counterproposals”.

3. In view of the undisputed evidence that the terms on which Wards insisted were recorded in written form by the Union representatives, no inference that Wards was unwilling to contract with the Unions can be drawn from Wards’ refusal to submit “counterproposals” in writing.

The Board attached significance to Wards’ refusal to give the Unions “a written statement of terms which would be agreeable to the respondent” (R. 64). adding “The respondent has offered no explanation for its refusal to submit * * * written countersuggestions” (R. 65).

This last is an absolute misstatement of fact.

Powell told the Union on November 12 that:

“I did not see any point in our submitting a written proposal until he could assure us definitely that the terms would be agreeable” (R. 743).

Powell then asked Barr for his opinion whether an employer, who has named his terms orally, must advance them in written form, adding:

“It does seem useless to present our terms in writing when we are pretty sure they will not be accepted” (R. 744).

Barr’s reply was, as quoted by the Board:

“The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing” (R. 44).

Wards’ reasons for not submitting its terms in writing were thus: (a) that no useful purpose would be served so long as their prior rejection when stated in oral form made their acceptance unlikely; (b) that the purposes of bargaining would best be served by keeping the negotiations flexible through oral discussion. This reasoning has had the Board’s own sanction in the past:

“Bargaining in the field of labor relations is customarily carried on over the conference table at which the representatives of both parties confront each other and exercise that personal and oral persuasion of which they are capable.”

Matter of P. Lorillard Co., 16 NLRB 684, at p. 696, enf’d: *NLRB v. P. Lorillard Co.*, (6th cir.), 117 Fed. (2d) 821 (revd. on another point, 314 U. S. 512, 62 S. Ct. 397, 86 L. Ed. 358).

Furthermore, the making of written “counterproposals” would in fact have served no useful purpose. The Unions had it in their power to record the terms on which Wards insisted, and did in fact so record them. Board’s Exhibits 10 and 12 are copies of the contracts submitted by the Unions, used by union representatives for the purpose of keeping a written record of Wards’ concessions, of the subjects on which agreement had been reached, and of Wards’ position as to the appropriate wage scale and

other controverted matters. The union representatives had the right and the opportunity to keep similar records at all the bargaining sessions.

4. No inference that Wards was unwilling to contract on the basis of existing policies and practices can be drawn from Wards' rejection of Union demands because they were "not consonant with company policy or practice".

(Arguing Specification of Error 15)

The Board's sixth point (See R. 65-6) in reality emphasizes Wards' good faith, because, by rejecting demands which changed the *status quo* on the express ground that they did so, Wards clearly implied that it would insist upon the *status quo*.

- E. The Board's seventh point erroneously assumed that an employer is deprived by the Act of the right to match dilatory tactics of the Union by similar tactics of his own, and that a two days' delay in negotiations with a Union which had previously delayed three months in presenting demands was evidence of bad faith.

(Arguing Specification of Error 13)

The next paragraph of the Board's conclusions described "further evidence" of Wards' supposed refusal to bargain. The first item was:

"* * * Although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28" (R. 66).

The Unions had taken their own time in presenting demands and in meeting to discuss them. The Warehousemen, certified on August 9, 1940 (R. 119-121), waited

until November 12, 1940, to hold a meeting. Both Unions were responsible for other delays in bargaining (see *e. g.*, R. 417, and 742). By dilatory tactics, the Unions waited until the beginning of the Christmas retail season to present their "ultimatum" or strike threat of November 25th, thus strengthening their economic weapon, the threat of strike.

The Act permits the employer to meet the Union's economic weapons by whatever action he feels necessary, such as closing his plant (*NLRB v. Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 669), or by keeping it open and hiring new employees (*NLRB v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381). By the same logic, the employer has the right to meet Union bargaining tactics with similar tactics.

Nor can the delay be made the basis for an inference of "bad faith". Wards did not intend to make further concessions (R. 746). Wards had already explained the terms on which it would insist. Certainly, so long as the Union had rejected these terms, and Wards did not plan further concessions, the delay is no basis for inferring that Wards was unwilling to agree on the terms it had already offered.

F. The Board's eighth point erroneously assumed that the Board had the power to pass judgment on the reasonableness of the terms upon which Wards from time to time insisted.

(Arguing Specification of Error 8)

The same paragraph of the Board's conclusions which discussed Wards' two-day delay referred to Wards' "inconsistent behavior" (R. 66) in supposedly changing its position on three matters during the course of negotiations.

1. The Board misstated the undisputed facts when it charged Wards with taking inconsistent positions as to Union demands.

(Arguing Specification of Error 14)

The Board first suggested that Powell conceded less than Barr instructed him to concede to the Union demand for overtime pay for time worked in excess of five hours between meals (R. 66-67). Barr, while he felt that "under normal conditions an employee should not be worked more than five consecutive hours", nevertheless told Powell:

"There may be some peculiar situation in Portland at which Article 7 is aimed, and I would hesitate to express an opinion without knowing all the facts" (R. 630).

Powell, as the Board says, "at all times insisted that the respondent's past policy of not paying overtime for less than six consecutive hours' work be followed" (R. 67). Powell's insistence on maintenance of the *status quo* in no way implied that "under normal circumstances" employees did in fact work more than five hours.

The Board next claimed that Barr's instructions on November 22: "insist on a no-strike clause without qualifications or exceptions" "repudiated his prior instructions to Powell to use his own discretion in such matters" (R. 67). The facts were that Barr earlier told Powell that the first sentence of section 11 of the Warehousemen's proposed contract, prohibiting strikes, was "a sentence which we should probably insist upon being included" (R. 631). He added that Powell "should exercise his own judgment" on the third sentence of this clause (R. 631). Powell, exercising his judgment, objected to the third sentence "as it appeared to abrogate the Union's obligation under sentence #1". He reported the ensuing discussion to Barr, and asked Barr for "any

additional comments you may have in regard to Article 11" (R. 741). This evoked Barr's instructions of November 22. No "repudiation" whatsoever took place.

The third and last instance concerns Powell's statement on December 16 that he "did not believe we employed persons such as those mentioned" (R. 67; see R. 764) in Article 6 of the Warehousemen's contract covering special rates for "a working foreman, forelady, supervisor, or instructor" (R. 132). The Board supposed this to be inconsistent with a previous admission on November 13 that "we do have working supervisors" (R. 739). The two statements were not necessarily contradictory since (a) the facts might have changed in the intervening month; and (b) apparently Wards did not employ working foremen, foreladies or instructors.

- 2. Wards had the right to change its position as to union demands and to withdraw concessions at any time before agreement was reached and the Board was without power to pass on the reasonableness of such change in position.**

The duty to bargain is the duty to agree to terms which are in fact acceptable to the employer. But, so long as the employer retains the liberty to decide what terms are in fact acceptable, this duty does not prevent an employer from changing his mind in the course of negotiations.

Nor is the Board empowered to examine into the sufficiency of the reasons for such a change in position, since an inquiry of this character is in essence an appraisal of the reasonableness of the employer's position and beyond the powers of the Board.

3. None of the supposed inconsistencies supports any inference of an unwillingness on the part of Wards to agree with the Unions on acceptable terms.

The fact that the positions taken were not in truth inconsistent removes the basis for any inference the Board might otherwise draw.

- G. The Board's ninth point was based on the erroneous assumptions that the Act prohibits an employer from telling his employees that his plant remains open despite a strike and that doing so evidences a lack of willingness to reach agreement with the Union on acceptable terms.

(Arguing Specification of Error 10)

The last point of the Board's conclusions charged Wards with soliciting strikers "to return to work in violation of Section 8 (1) of the Act". This conduct the Board held to be also a *per se* violation of Section 8 (5), saying:

"The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67).

1. Wards did not engage in any solicitation of strikers amounting to a disregard of the Unions' exclusive representation of Wards' employees.

The day after the strike began, Wards' supervisors were handed a list of the names and telephone numbers of their employees, with instructions to call the employees, saying:

"Since you were not at work today, I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in" (R. 580).

These instructions were as follows:

“(When you have made the above statement, listen for the employee’s reaction to it. Do not make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not in any way insist that the employee should come to work or intimate that their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come in)” (R. 580).

The Board, discussing the 8 (1) charges, held that, by merely making the telephone calls, Wards

“was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity” (R. 74) and was “undercutting * * * the authority of the Unions to act as the exclusive bargaining agents” (R. 74).

The situation is very similar to that in *Wilson & Co., Inc. v. NLRB*, (7th cir.), 120 Fed. (2d) 913, where an employer wrote his striking employees, announcing a reopening, and saying (p. 919):

“* * * Those employees who do not report to work at their regular time, or furnish us some reasons other than the strike, will be assumed to have resigned * * * and other persons permanently engaged to perform their duties.”

The Seventh Circuit Court of Appeals said (at p. 919):

“The warning, if it may be termed such, which petitioner by this letter gave its striking employees as to what it proposed to do, was concerning matters within its legal province.”

A fortiori, Wards was within its legal province in merely telling its employees the plant was open.

2. Wards did not engage in any solicitation of strikers evidencing a lack of good faith on its part during negotiations.

If Wards had the right to advise its employees that the plant was open, the fact that Wards did so cannot support an inference of "bad faith" of any kind.

Wards, when it made these calls, did not know which of its many employees not at work was a striker, or was home ill, or was home under a misapprehension that the plant was closed. The units represented by the striking unions included only a part of Wards' employees; and only a part of the employees in those units were union members.

The calls said "your job is open for you *if you want to come in*" (italics added). The instructions were: "above all, do not insist that the employee should come to work or intimate that their jobs will be in danger." The calls neither threatened the employees nor offered them inducements. The record does not show that a single striker was induced to desert the union.

If this be "solicitation", so is the mere keeping open of a struck plant, which impliedly invites striking employees to return to work.

H. None of the Board's nine points were substantial since none related to matters which afforded any serious or final impediment to the reaching of an agreement.

Within the scope of his freedom to refuse unacceptable terms, the employer has the *right* to chaffer or haggle as well as the *duty* to bargain. To hold that he must immediately reveal his minimum terms is to strip him of the right to chaffer effectively. Collective bargaining should not be reduced to protocol, but should be flexible,

leaving both parties free to advance arguments and positions without stopping to consider what inferences the Board might possibly draw from every phrase or statement.

For that reason, evidence of positions taken or statements made which were not the cause of a failure to reach an agreement can not support a finding of failure to bargain:

“We do not think, however, that Beckerman’s remark concerning a bond was advanced as a serious and final impediment to the consummation of a contract. Nor do we think that the union regarded it as such. We are convinced that the controlling factor in the breakdown of the negotiations was the inability of the parties to agree upon substantive terms. Accordingly we shall dismiss the complaint.”

In re Beckerman Shoe Corp., 21 NLRB 1222, at p. 1235.

Such evidence does not rise to the status of substantiality:

“* * * A reasonable mind would not accept the evidence of the mere fact of submitting a proposal as adequate to support a conclusion that respondents refused to bargain.”

NLRB v. Grower-Shipper Vegetable Ass’n of Central California, (9th cir.), 122 Fed. (2d) 368 at p. 373.

In the present case, the Board itself quotes the conciliator present at the last bargaining conference as summing up the “clauses * * * to which the respondent objected primarily” as those calling for a union shop, a wage increase, strict seniority, and arbitration (R. 54). These were the issues upon which the bargaining reached an impasse. *Not a single one of the Board’s nine points relates to the issues on which the parties split.*

IV.

Even If the Record Contains Some Evidence Substantial Enough to Support a Finding of Failure to Bargain Collectively, the Order Should Be Set Aside and the Case Remanded to the Board Because the Board Appraised the Evidence in the Light of a Mistaken View of the Law.

(Arguing Specification of Error 16)

After reciting the nine "respects" in which Wards "failed to comply with its obligation to bargain collectively" (R. 58), the Board concluded:

"Reviewing the whole congeries of events, we find that the respondent did not, as it was bound to do, 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation' " (R. 68).

The Board thus based its ultimate finding upon the total effect of the several specific acts which it believed evidenced a failure to bargain collectively.

A. This Court has the power to refuse to enforce orders of the Board which are based upon findings made under a mistaken view of the law and to remand such cases to the Board.

In *Ford Motor Co. v. NLRB*, 305 U. S. 364, at p. 373, 59 S. Ct. 301, 83 L. Ed. 221, the Supreme Court approved the rights of a Court to remand a case to the Board:

"* * * The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law * * *."

Ford Motor Co. v. NLRB, 305 U. S. 364, at p. 374.

In specific application of this principle, the Supreme Court in *NLRB v. Virginia Electric & Power Co.*, (Dec. 22, 1941) 314 U. S. 469, 62 S. Ct. 344, at p. 349, 86 L. Ed. 306, after discussing the principles of law applicable to the issues before it, said:

“Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by the record. Rather it appears that the Board *rested heavily upon findings* with regard to the bulletin and the speeches, *the adequacy of which we regard as doubtful*. We therefore remand the cause * * * for a redetermination of the issues in the light of this opinion” (Italics added).

Texas Co. v. NLRB, (9th cir.) 120 Fed. (2d) 186, is an application of the same principle by this Court.

The right to remand is generally recognized in the field of administrative law. Passages from two other recent decisions of the Supreme Court follow:

“* * * *the factual inquiries and findings of the Board, made under a view of the law not our own, are quite likely not in all respects those which the Board would have made had it proceeded with knowledge of our opinion*, and are in some respects ambiguous for the purpose of decision in accordance with it. Accordingly, we reverse the decision by the United States Court of Appeals for the District of Columbia and remand these cases to the Board for further proceedings not inconsistent with this opinion.” (Italics added.)

District of Columbia v. Murphy, and *District of Columbia v. De Hart*, (Dec. 15, 1941), 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 277 at p. 311 of Supreme Court Reporter.

“***We would not disturb those conclusions if only a question as to the weight of the evidence was involved. But *we are not satisfied that the Commission applied the proper criterion* in reaching its conclusion.

“***But once the territory has been defined, the statutory test of whether an applicant was a ‘common carrier’ by motor vehicle in ‘bona fide operation’ during the critical periods is the same for the irregular and the regular route carrier. *We are not confident that the Commission has approached the problem in that way.* For it has repeatedly stated beginning with Powell Brothers Truck Lines, Inc., 9 M. C. C. 785, 791-792, that: * * *

*“The precise grounds for the Commission’s determination * * * are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. * * ** Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. *If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. * * ** Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence * * *.” (Italics added.)

U. S. et al. v. Carolina Freight Carriers Corp.,
 U. S., 62 S. Ct. 722, at pp. 727-730, 86 L.
 Ed. 622

In none of the cases cited did the Supreme Court decide that the record was devoid of substantial evidence to support the administrative finding; the Court simply did not presume to decide whether, under a correct view of the law, the administrative agency would have reached the same decision as that attacked before the Court. Nor did the Court feel called upon to find an obvious and certain error in the view of the law held by the agency before remanding the case. To the Court, a remand was neces-

sary if the Court was “not confident” that a proper view of the law had been held, or if the Court “was not satisfied” that the agency had applied the proper criteria.

The principle of law may be stated in these words: Whenever an administrative finding has been made, or possibly may have been made, under a view of the law which differs from that of the Court, the case should be remanded so that the administrative agency can reappraise the facts in the light of the correct interpretation of the law. When one or more of the findings upon which the agency has “rested heavily” may have been influenced by such a mistaken view of the law, the reviewing Court should not assume the responsibility of determining the extent to which the error of law affected the final decision, but will require the administrative agency to do so.

B. The Board drew its conclusions in the present case under a mistaken view of the law in several major respects.

This assertion has already been clearly demonstrated by our discussion of the nine points on which the Board based its conclusions. Even if we are wrong as to one or two of them, a single mistake of law as to the fundamental duty would contaminate and undermine the whole decision.

C. The Board’s mistaken view of the law so affected its findings that its Order should not be permitted to stand.

Take, for example, the Board’s mistaken belief that the refusal of Wards to decide in advance of agreement that a written contract should be signed was “tantamount to a refusal to bargain altogether”. In “reviewing the whole congeries of events”, the Board, as a trier of

facts, naturally gave great weight to evidence of conduct which in its opinion directly amounted to a violation of law. The Board's appraisal of the weight of the balance of the evidence was doubtless directly affected by its misconception of the duty to bargain in this one respect alone.

The Board's mistaken beliefs that it had the power to pass judgment on the reasonableness of Wards' answers to Union demands and that Wards was under a duty to offer concessions must equally have affected its judgment upon Wards' conduct of negotiations.

The Board's completely indefensible view that Wards violated the law by telling its employees that the struck plant remained open for business would, by itself, invalidate the Board's final conclusion. The mistaken assumption that Wards' deliberate act was wrongful could not help but color and affect the Board's ultimate conclusion that Wards acted in bad faith.

The Board's errors of law thus were inextricable from the Board's ultimate conclusion. This reason alone should persuade this Court to set aside the challenged order, even apart from the complete insufficiency of the evidence to support a finding of failure to bargain.

V.

The Order As to Interference, Restraint, and Coercion Lacks Substantial Support and Should Be Set Aside.

(Arguing Specifications of Error 18 and 19)

The findings as to an 8 (1) violation are predicated (a) on the telephone calls by supervisors to strikers telling them the plant remained open for business, and (b) on certain statements by McGowan.

We have already shown that the telephone calls were within the scope of the ruling in *Wilson & Co. v. NLRB*, (7th cir.), 120 Fed. 913, at p. 919.

As to the supposed statements by McGowan the Board found that McGowan's acts were unauthorized, since, as to them, McGowan "went beyond" his "instructions" (R. 70). The record does not show any knowledge on the part of Wards of this breach of instructions. Under these circumstances, Wards was not "responsible" within the rule of *International Assn. of Machinists v. NLRB*, 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50; *NLRB v. Link-Belt Co.*, 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368; and *H. J. Heinz Co. v. NLRB*, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309. While the technicalities of *respondeat superior* do not apply, some basis for responsibility must appear.

If supervisors are "emulating the example set by the management" (*Int'l Ass'n of Machinists v. NLRB*, 311 U. S. 72, at p. 81, 61 S. Ct. 83, 85 L. Ed. 50), or the management shows "apparent acquiescence" in the criticized activities (*NLRB v. Link-Belt Co.*, 311 U. S. 584, at p. 598, 61 S. Ct. 358, 85 L. Ed. 368), or the management, after being "advised", does not "correct the impression of the employees" (*Heinz Co. v. NLRB*, 311 U. S. 514, at p. 521, 61 S. Ct. 320, 85 L. Ed. 309), an employer is "fairly responsible" for the acts of his supervisors. But McGowan acted in breach of express instructions; his acts were not known to Wards, and hence were not "acquiesced" in; and Wards had no duty to "correct an impression" which it did not know had been created.

Respectfully submitted,

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No. 10108

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & Co., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10108

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). Respondent is an Illinois corporation operating a mail-order house and retail store in Portland, Oregon, where the unfair labor practices occurred. The jurisdiction of this Court is based upon Section 10 (e) of the Act.

STATEMENT OF THE CASE

Upon proceedings had pursuant to Section 10 of the Act,¹ the Board, on November 29, 1941, issued its findings of fact, conclusions of law, and order (R. 22-85), which may be briefly summarized as follows:

Respondent's business (R. 26).—Respondent is engaged in the sale and distribution of merchandise through 9 mail order houses, 650 retail stores, and 206 mail order sales units, located in various states. Only the Portland mail order house and retail store are here involved. The retail store sales amount to about \$3,000,000 annually; the mail order house sales to about \$13,000,000 annually. Approximately 90 percent of the goods distributed by the mail order house and the retail store are shipped to Portland from outside the State of Oregon. Less than one percent of the sales of the retail stores are delivered to customers outside the State of Oregon, but approximately 60 percent of the sales of the mail order house are so delivered.²

¹ These included charges filed by Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, affiliated with the American Federation of Labor (R. 1-3); charges filed by Retail Clerks' International Protective Association, Local No. 1257, affiliated with the American Federation of Labor (R. 4-6); a consolidated complaint of the Board dated March 31, 1941 (R. 8-14); answer of respondent (R. 16-21); hearing before a Trial Examiner, April 14 to 17, 1941; Intermediate Report of the Trial Examiner; respondent's exceptions thereto and brief; and oral argument before the Board in Washington, D. C., on August 5, 1941.

² Upon these facts which were stipulated at the hearing (R. 522-524) the Board's jurisdiction is clear. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and com-

The unfair labor practices (R. 27-33).—Respondent, in violation of Section 8 (5) and (1) of the Act, refused to bargain collectively in good faith with Warehousemen's Union, Local No. 206 (herein called Warehousemen), and Retail Clerks' International Protective Association, Local No. 1257 (herein called Retail Clerks), said two unions being herein collectively called the Unions; and during a strike caused and prolonged by respondent's refusal to bargain collectively in good faith, respondent, in further violation of Section 8 (1), made coercive statements, and also solicited employees individually to return to work in an effort to induce them to desert the Unions and to abandon their concerted activities.

The Board's order (R. 80-85).—In addition to the usual cease and desist provisions, the Board ordered respondent to bargain collectively with the Unions, to reinstate with back pay such striking employees as respondent had theretofore refused to reinstate, and, upon application, to reinstate or place upon a preferential hiring list the remaining strikers, with back pay from any denial of their application for reinstatement or placement on a preferential list.

panion cases; *Virginia Electric & Power Co. v. National Labor Relations Board*, 115 F. (2d) 414, 415-416 (C. C. A. 4), approved in this respect, 314 U. S. 469, 476; *National Labor Relations Board v. Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), cert. denied, 314 U. S. 693. The applicability of the Act to this very mail order house and retail store was sustained by the Circuit Court of Appeals for the Seventh Circuit in *Montgomery Ward & Co. v. National Labor Relations Board*, 107 F. (2d) 555, 558; see also *Montgomery Ward & Co. v. National Labor Relations Board*, 115 F. (2d) 700 (C. C. A. 8). Respondent does not question the Board's jurisdiction.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

II. The Board's order is valid and proper under the Act.

ARGUMENT

POINT I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act³

The Board, after reviewing a series of negotiations taking place during September, October, November, and December 1940, between respondent and the Unions covering proposed contracts submitted by the Unions, found (R. 68, 80) that respondent "did not, as it was bound to do, 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation,' " that its failure to do so constituted a refusal to bargain in violation of Section 8 (5) and (1) of the Act, and that "a substantial cause" of a strike called by the Unions in December 1940 "and its prolongation was the justified feeling of the Unions that the respondent was 'stalling'; that is, not fulfilling its obligation to bargain

³ The pertinent sections of the Act are set forth in full in an appendix to this brief, p. 42, *infra*.

collectively as required by the Act.”⁴ The following resume of the evidence upon which the Board relied shows clearly that the Board’s ultimate findings are amply supported.

A. The September 19 and October 22 conferences with the Retail Clerks

The first meeting of respondent with the Unions was with the Retail Clerks on September 19, 1940. At this meeting the discussion centered chiefly about questions of the appropriate unit and whether the Retail Clerks represented a majority (R. 328-329). W. B. Powell, representing respondent,⁵ asked that a single contract be negotiated for the entire retail store (R. 331, 508). Fred Dixon, representing the Retail Clerks, explained that his organization had no jurisdiction over office workers, that the Office Employees Union had such jurisdiction, and while maintaining the appropriateness of separate units for each group, indicated a will-

⁴ Having previously certified the Warehousemen as the exclusive bargaining representative of certain described employees of the Portland mail order house (R. 119-121), the Board found that Warehousemen was on August 10, 1940, and at all times thereafter, the duly designated representative of a majority of the employees in an appropriate bargaining unit (R. 27-28). The Board further found that the unit sought by Retail Clerks constituted an appropriate unit and that Retail Clerks on August 6, 1940, and at all times thereafter, represented a majority of the employees in said unit (R. 30, 32). Respondent does not question either the appropriateness of the units found by the Board or the Unions’ majority status therein.

⁵ Powell, respondent’s West Coast labor representative, had been instructed by John A. Barr, his superior in the Chicago Office of respondent and in charge of labor relations matters at all of respondent’s mail order houses and retail stores, to represent respondent in the negotiations (R. 137, 825).

ingness to arrange for negotiating a contract jointly with the Office Employees Union (R. 331-332; Bd. Exh. 6, R. 323). Before adjourning, Dixon asked Powell whether, if an agreement were reached, respondent was "in a position to sign an agreement"; Powell replied that "they didn't sign any agreements" and that to his knowledge "they had no signed agreements" (R. 335, 449-450, 857, 705).⁶

An arrangement having been worked out whereby the Retail Clerks and the Office Employees Union would negotiate a single contract covering the employ-

⁶ The Board found in an earlier decision involving the mail order house and retail store here involved (9 N. L. R. B. 538), which was sustained with minor modifications in *Montgomery Ward & Co. v. National Labor Relations Board*, 107 F. (2d) 555 (C. C. A. 7), that respondent had, after attempts were made in November 1936 to organize the employees, issued a statement in which reference was made to "our long-established policy to enter into no business agreement with any outside organization." The statement in full is as follows (9 N. L. R. B., at 542) :

"We recognize the rights of our employees to join or refrain from joining any organization as they see fit. We sincerely believe that there is no advantage to you in joining any outside organization, and it represents an unwise expense to you.

"It is our long-established policy to enter into no business agreement with any outside organization in view of our policy of fair dealing and open frank discussions with our own people. It is not believed there is anything whatever to be gained by such a contract, nor is there any legal requirements for it.

"We will not permit any organization whatever to dictate our wage rate, the right of hiring or dismissal, nor any of our personnel policies."

Powell's stand at the September 19 conference makes it clear that respondent's "long-established policy" in 1936 was still in effect in 1940, though it plainly violated the Act. *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514.

ees of the retail store, the parties again met on October 22. Union Representative Dixon opened the conference by asking if respondent was satisfied that they represented a majority of the Retail Clerks. Powell assured them that he was accepting them as representing a majority and the discussion turned to Section 1 of the Retail Clerks' proposed agreement providing for a union shop (R. 338-339). Powell refused to agree to a union shop, asserting that it was contrary to "company policy," that "they weren't going to compel anybody to belong to a union in order to have employment with Montgomery Ward & Company" (R. 339-340). When Powell remained unmoved by a number of arguments which Dixon presented in favor of granting a union shop, Dixon requested Powell to present counterproposals, or as he termed it, a "substitute" provision (R. 339-340, 465). Powell took the request under consideration (R. 346-348). The next day Dixon called Powell on the telephone and renewed his request for a counterproposal (R. 347-348). Powell merely reaffirmed his original stand, declaring that respondent's "counterproposal" would be that "the work of organizing the employees should be done by the union" (Resp. Exh. 24, R. 822). Dixon then inquired if respondent had any counterproposal to offer to the entire contract (*ibid.*). Powell replied that he could "not see why they had to give us a counterproposal, because they weren't asking anything from the union while the union was asking from them [and he] couldn't see any sense in them giving us a counterproposal" (R. 348-349). Throughout the nego-

tiations Powell, in plain violation of the requirements of the Act (*infra*, pp. 30-33), continued to maintain this same negative position; that is, that respondent could sit back and refuse to take any initiative in the negotiations, and hence that it was under no obligation to submit counterproposals.⁷

B. The November 12 conference with the Warehousemen

The first meeting of respondent with the Warehousemen was held on November 12. At this meeting the Warehousemen's proposed contract was discussed paragraph by paragraph. With one possible exception,⁸ not a single provision was acceptable

⁷ The full sweep of respondent's "do-nothing" policy and the cold calculation with which it was adopted are strikingly revealed in a letter of instructions Barr sent to Powell during the negotiations, in part as follows (Resp. Exh. 18, R. 735):

"1. The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing.

"2. The union is seeking something from us. We are not to assume the initiative by volunteering proposals or counterproposals.

"3. In discussing individual clauses, state that you have no present objection to clauses which are not objectionable, but do not 'agree' to such clauses. You can only agree to a contract as a whole.

"4. Insist on a 'no-strike' clause without qualifications or exceptions.

"5. Whenever in doubt as to what you should do, resolve the doubt in favor of the Company. Err on the side of conservatism if you err at all.

"6. Do not rush the bargaining process and do not yourself take the initiative in seeking an agreement."

⁸ Union Representative Estabrook testified that he did not think Powell offered any objection to Article 10, providing that respondent should adhere to its past practice regarding vacations (R. 156).

to Powell (R. 146-158). Not even the clause providing for recognition of the Warehousemen (Bd. Exh. 3, R. 128) nor the one prohibiting antiunion discrimination (Bd. Exh. 3, R. 132) was acceptable, Powell taking the stand that as these matters were provided for by law, they were not a proper subject of agreement (R. 155, 282; Resp. Exh. 19, R. 737, 740). When the Union insisted that the recognition clause be included in the contract, Powell suggested that similar language be placed merely in a preliminary "whereas" clause (R. 282; Bd. Exh. 12, R. 556, Resp. Exh. 19, R. 737, cf. Resp. Exh. 10, R. 629).

The Union's proposals for a union shop, a seniority rule, the creation of a "Board of Adjustment" to settle differences by arbitration, were each rejected as being contrary to "company policy" (R. 148, 153, 158, 283; Resp. Exh. 19, R. 740). Powell testified in connection with these proposals that respondent believed that "the ultimate decision in matters affecting the hiring and discharge of employees and matters generally affecting the operation of the business, should remain in the management of the company", that this was necessary "in order to operate this business, the mail-order business and the retail-store business successfully" (R. 829). Powell explained respondent's policy in connection with these proposals, asserting in connection with the union-shop proposal that it was not respondent's policy to force its employees into a union (R. 148). With respect to seniority Powell stated that respondent's policy in determining whom to lay off and rehire was to consider efficiency, ability, adaptability, promot-

ability, flexibility, age, sex, and marital status, as well as seniority (Resp. Exh. 19, R. 740; R. 192)⁹ Powell explained his rejection of the Union's proposal for the creation of a Board of Adjustment to settle differences arising under the contract by saying that "the ultimate decision on matters affecting the operation of the business should remain in the Management" (Resp. Exh. 19, R. 742; R. 158, 191).¹⁰ Powell flatly refused to agree to the union proposal for an increase in wages, stating that respondent's policy with respect to wages was to pay as much or more than its competitors for comparative work and that this was being done; this the union disputed. Powell then advised the union representatives of the minimum rates being paid in the various classifications (R. 151-152, 193).

⁹ "What a mess of words," was Barr's frank observation concerning respondent's position with respect to seniority (Resp. Exh. 10, R. 631).

¹⁰ The unwilling attitude with which respondent approached the making of a collective agreement, which, to the extent that it imposes binding commitments upon an employer, necessarily impinges upon what would otherwise be the "prerogatives of management," is plainly disclosed in a letter which Barr had previously written Powell concerning a similar demand for an arbitration clause by the Retail Clerks, as follows (Resp. Exh. 8, R. 625):

"Our thinking with regard to arbitration clauses is that they are not acceptable to us. We are not prepared to voluntarily relinquish any of the prerogatives of management in our dealings with the union. It is impossible to agree to any sort of an arbitration set-up without to some extent vesting in an outsider a decision-making prerogative which we feel must be retained within the management."

Powell also refused to agree to the Union's request for a meal period after 5 hours of continuous work, insisting that the period should be 6 hours (R. 154); he did this despite the fact that his superior, Barr, had previously written him "that under normal conditions an employee should not be worked more than five consecutive hours without a meal period" (Resp. Exh. 10, R. 630). Powell rejected the Union's proposal for additional compensation for working supervisors upon the ground that "they didn't employ anybody under these names, and they didn't think it was necessary or any use to argue about something they didn't contemplate doing" (R. 284). The spuriousness of this ground for rejecting the Union's demand is apparent from Powell's report to Barr immediately after the meeting, that "as a matter of fact we do have working supervisors in the Portland plant" (Resp. Exh. 19, R. 739).

The union spokesman then requested respondent to prepare "a written statement of terms which would be agreeable to the Company." Respondent's peculiar concept of collective bargaining is manifest from Powell's reply: he stated that it would serve no useful purpose for respondent to do so unless respondent could be assured that the terms would be agreeable to the Union (Resp. Exh. 19, R. 743)—in other words, that the Company proposals would not be subject to any negotiations, but merely to acceptance on a "take it or leave it" basis. The union representative did not assent to this, and repeated his request for a written counterproposal so that "they would have

something to submit at the meeting of the Union members." Powell flatly refused (*ibid.*).¹¹

C. The November 25 joint conference with the Retail Clerks and the Warehousemen

On November 25, a joint conference between representatives of respondent and representatives of both Unions was held at Oakland, California (R. 159). Early in the conference, according to Powell himself, the union representatives asked him, "Will your company sign a contract?" (R. 834). Powell did not assure the Unions of respondent's willingness to do so, as the law requires; instead he hedged, as he had been instructed by Barr to do,¹² by suggesting that it depended upon what the Unions' proposals were (*ibid.*). A discussion of various provisions of the proposed contract ensued, including particularly a dis-

¹¹ It is interesting to note that Powell had his doubts about the propriety of the position he had taken with respect to the request for counterproposals. Thus in a letter to Barr written on November 13 he expressed himself as follows (Resp. Exh. 19, R. 743-744):

"I would like to submit this for your consideration. Do you feel that our obligation to bargain in good faith requires that we submit the company's position in writing? The question of reasonableness is involved here, and I have not yet reached a conclusion in my own mind. There is some argument to the effect that if we will state verbally the terms which are agreeable to us we should have no objection to reducing those terms to writing
* * *."

¹² A day or two earlier Barr had written Powell (Resp. Exh. 18, R. 736):

"Whether or not any agreement reached will be reduced to writing and signed can only be determined after an agreement is reached. Prior to that time a discussion of this point is premature."

cussion of the Unions' demands for a union shop (R. 208-209, 287, 835-836). Powell again declared that a union shop was against "company policy" (R. 286-287, 833-835). The union representatives, pointing out that respondent had repeatedly rejected their proposals upon the grounds of "company policy" (R. 161-162, 164), inquired whether Powell had the authority to change "company policy," so as to facilitate agreement.¹³ When Powell answered that he did not (R. 166), the union representatives offered to take an airplane to Chicago to take up their proposals with officials having such authority (R. 162-164, 289). Although the Unions insisted upon receiving a prompt answer to this proposition, Powell put them off, agreeing to give an answer in three days (R. 289). Thereupon the union representatives expressed the view that they "were being stalled" (R. 161-162); that that was indeed the fact is evident from Powell's report to Barr on November 26 of the meeting of November 25 in part as follows (Resp. Exh. 20, R. 746):

* * * At first they insisted we give them a reply within twenty-four hours, but later agreed to allow us until noon on Thursday, November 28. I will wait until Thursday morning at which time I will call Mr. White in San Francisco and explain that you will be glad to meet with union representatives in Chicago and listen to their argument, but I will not assure

¹³ One of the union representatives also inquired whether "company policy" was the same as it was in 1936 or 1937, when respondent discharged a number of men for joining the Union. Powell replied, according to the representative, "not to his knowledge" (R. 287-288). See note 6, p. 6, *supra*.

him that any change in policy is contemplated, I will state that as far as I know no change is contemplated at the present time.

Thus, as the Board found (R. 48), "it is to be observed that although the respondent had made its decision, as early as November 26, on the Union's suggestion that the negotiations be continued in Chicago, and although the respondent was fully aware of the Union's desire for an early reply, it deliberately delayed its reply to [the Union] until November 28."

D. The strike and respondent's efforts to induce the employees to abandon the Unions and return to work

Although the Unions were advised just before the expiration of the 3-day period agreed upon at the November 25 conference that respondent had not receded from any of the positions taken during the negotiations (R. 841), the Unions did not carry out a threat to strike which they had made at the November 25 conference, but sought to arrange further meetings with respondent (R. 355-357). On December 2, Dixon, representing the Retail Clerks, informed the manager of the Portland retail store that "we were very anxious to try to bring about a settlement"; that they thought "that the company was stalling for time"; and that the Retail Clerks was willing to withhold strike action if respondent would arrange for a meeting with them. The manager replied that he would try to induce Powell to come to Portland (R. 355-357). On December 4, the employees of the Oakland plant went out on strike, and Powell remained in Oakland attempting to settle the strike there (R. 842). After a further in-

quiry from Dixon concerning negotiations on behalf of the Portland employees, Dixon received word from Powell that negotiations were being carried on at Oakland. Dixon objected to bargaining at Oakland but nevertheless offered to permit the negotiations to be carried on at Oakland in behalf of the Portland employees if it were impossible for respondent to send a representative to Portland (R. 445-446). Hearing nothing further, however, from respondent on December 6, the members of the Retail Clerks unanimously voted to go on strike at Portland the next day, primarily because of their sentiment that respondent had refused "to negotiate a contract at Portland" (R. 358). Immediately thereafter the Warehousemen declared a strike at Portland to support the Retail Clerks and because "the membership got tired of Montgomery Ward stalling us around" (R. 258, 213-214). On December 7, picket lines were established outside the mail-order house and the retail store, and the strike began.

On Sunday, December 8, the superintendent of the mail-order house called a meeting of the operating superintendents of each floor, handed them a list of the names and telephone numbers of employees who worked under them, and instructed them to transmit to those employees a message as follows (Resp. Exh. 7, R. 580; R. 566-569):

"Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in."

(When you have made the above statement, listen for the employee's reaction to it. Do not

make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not insist that the employee should come to work or intimate that their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come in.)

One of the superintendents called in and given these instructions was W. A. McGowan, the operating superintendent of the fifth floor of the mail-order house, who had about 50 employees under his supervision (R. 564-566). McGowan did not limit himself to circulating the quoted message; he not only informed his subordinates that respondent was operating as usual, but he also flatly warned them that if they did not return to work by a certain date, he would replace them with new employees.

Thus he advised one of his subordinates over the telephone "to tell the kids that if they weren't there on Monday morning (December 9) he was going to reinstate them with new employees" (R. 615). McGowan visited Employee Robert Fullerton at the latter's home¹⁴ and stated that "he was just making a friendly call * * * coming around to each and every one that he figured he could trust * * * in order to get them

¹⁴ McGowan had never visited Fullerton's home before (R. 774).

back to work, and to tell them that if they were not there by a certain date, they would have to have their jobs refilled" (R. 776); McGowan further stated that respondent "would never go union, that if it did, they would lock the door" (R. 777). During the strike McGowan also called at Employee William E. Hough's home, but did not find him in. When Hough later looked up McGowan, McGowan suggested that he could come back to work without going through the picket line, that is, by "the back way of the store" and urged him to persuade his fellow workers to "come in the back door" (R. 595; cf. 613-614). McGowan also informed him that "the store would never go union; that they would lock the store and send all the books and everything to the Chicago house before they would sign a union contract" (R. 592; cf. R. 789).¹⁵

E. The December 13, 14, and 16 joint conferences with the Retail Clerks and the Warehousemen

On December 13, 14, and 16, while the strike was in progress, further meetings were held. A Conciliator

¹⁵ Respondent is clearly responsible for the efforts of Superintendent McGowan to induce the employees to abandon their concerted activities, notwithstanding the instructions which were given him. As the Supreme Court held in *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, where employees "have just cause to believe" that supervisory officials are "acting for and on behalf of management," the employer may be held accountable for their activities even though the acts in question "were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior" (311 U. S., at 80). See also *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 520-521; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584; *National Labor Relations Board v. Pacific Gas and Electric Co.*, 118 F. (2d) 780, 787 (C. C. A. 9).

of the United States Department of Labor, Frank Ashe, was present at these meetings. The December 13 meeting began with a consideration of the provision for recognition in the Warehousemen's proposed contract. Powell reiterated his earlier statement that recognition "was not a matter of agreement but was a question of fact which had been decided" (Resp. Exh. 21, R. 749; see also R. 297). Concerning the proposal for a union shop he announced that respondent's policy had not changed in any respect (Resp. Exh. 21, R. 750; R. 176). Thereupon the Unions proposed various modifications of the union-shop provisions, but Powell turned down each proposal (Resp. Exh. 21, R. 750; R. 176). Landye, the attorney for the Unions, then asked whether respondent would submit to arbitration all of the Unions' demands except the demand for a union shop. When Powell answered in the negative, Landye asked whether respondent would be willing to submit the whole matter to arbitration, including the union-shop question. Powell refused to agree to this also (R. 515, 170, 179, cf. R. 310). Landye then inquired whether respondent would accept the contract proposed by the Warehousemen if the union-shop clause were eliminated. Powell stated that respondent had substantial objections to certain other provisions. Thereupon Landye requested Powell to submit counterproposals to the entire contracts submitted by the Unions, stating that since respondent could not agree to the proposals of the Union, it was respondent's duty to set forth what would be acceptable to it (Resp. Exh.

21, R. 751; R. 858). As Landye testified (R. 516-517):

I stated that I wanted the company to take each section of the unions' contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract.

Mr. Powell stated that the company was not asking anything from us, and that it was up to us to make proposals that would please the company; and that he said his conception of negotiations was that the company had no affirmative duty to do anything, and that it was up to the union to please the company.

In short, Powell's reply to the Union's request was, to use his own words, that "our proposal or demand at present was that the picket lines be removed and the employees be allowed to return to work," and that "the Company had no other proposal to submit nor did the Company intend to make any other demands on the Union" (Resp. Exh. 21, R. 752; See also R. 171, 265-266, 369).

The next meeting was held on December 14, 1940, at the request of Conciliator Ashe. He opened the meeting by asking Powell if respondent "had anything at all in the way of a proposal to submit which might provide a basis for an agreement." Powell replied that respondent had nothing further to submit other than the statement of its position in regard to each one of the proposals theretofore submitted. Powell was then asked if respondent would be willing to sign an agreement which merely set out its present policies and practices. He replied, so the union rep-

representatives uniformly testified, "No" (R. 175, 452).¹⁶ The question of wages was passed over after Powell claimed and the union representatives disputed that respondent was paying the wages its competitors were (R. 179-181, 242-243; Resp. Exh. 22, R. 757-758). Conciliator Ashe then suggested that they discuss the Unions' demands, one by one, and asked that a stenographer take down what was said, explaining that he could not remember all that had been said and that "he felt sure the union representatives did not understand just what the Company's position is" (Resp. Exh. 22, R. 758; R. 173). Powell objected to such a procedure and further discussion was postponed until the following Monday, December 16 (*ibid.*).

On this day the various representatives again met. One of the union representatives requested that the Warehousemen's contract be gone over clause by clause (Resp. Exh. 23, R. 760). Once again Powell

¹⁶ According to Powell's testimony, he answered by saying that "the question as to the signing of an agreement was one which had not been reached in our negotiations thus far, and therefore * * * was premature" (R. 856). This, beside being in itself a violation of the Act (*infra*, pp. 25-26), was an obvious evasion of the question which had been asked. Note also Powell's report to Barr on the point (Resp. Exh. 22, R. 757):

"Allen then asked if the Company would be willing to sign an agreement which merely sets out the present policies and practices. *I replied that the question of the form of the agreement—that is, whether it should be verbal or written—is premature at this time.* I suggested that if we could reach an agreement on substantial provisions, then that question should be considered. Allen then stated that if we could reach an agreement, *would we be willing to sign it. I replied that possibly we would, but that I thought a discussion of that question was premature.*" [Emphasis supplied.]

reiterated respondent's objections to the union shop, seniority, and arbitration proposals, and questioned the advisability of proceeding with the discussion unless the Union agreed to withdraw these demands (*ibid.*). When the union representatives stated that there was a possibility that the demand for a union shop would be withdrawn, Powell agreed to discuss the Union's other demands (Resp. Exh. 23, R. 761). In the discussion which followed, the Unions also receded from their original position with respect to seniority, offering to permit "merit and ability" to be considered, as well as seniority, in determining whom to lay off and to rehire (Resp. Exh. 23, R. 770-771). Moreover, the Unions indicated a willingness to abandon their request for an arbitration arrangement (Resp. Exh. 23, R. 764). Nevertheless, Powell adhered inflexibly to the positions he had taken previously with respect to the Unions' proposals (Resp. Exh. 23, R. 761-771) and refused even to agree to those demands which involved the making of no concession to the Unions, such as the recognition and no-discrimination clauses. Repeating his former objections, Powell again refused to agree to the inclusion of the recognition clause in the obligating part of the agreement (Resp. Exh. 23, R. 761-762; Bd. Exh. 12, R. 556). Despite a long discussion Powell refused to agree to the inclusion in the agreement of a clause prohibiting anti-union discrimination. Powell's adamant stand with respect to this clause is disclosed by his own report of the discussion of the matter to Barr, as follows (Resp. Exh. 23, R. 765):

We objected to Section 1 of Article 8 and a long discussion ensued. Ashe agreed we were bound as a matter of law to observe the policy set out in this Section and stated he saw no reason for us objecting to its inclusion in an agreement unless we merely did not want to give the Union the satisfaction of having it there. He also read to us similar clauses in other agreements and asked us if we would change these other agreements in other industries. We stated it was up to those people as to what they desired to put in their agreements. Then the Union representative and Ashe argued that such a clause should be included because a lot of the Union members did not know of a similar provision in the Wagner Act. Finally the Union agreed to pass to the next clause.

Powell refused the Union's demand for increased wages with the assertion that "they (respondent) were the ones to decide whether the employees should have more money" (R. 373). Powell again rejected the Unions' demand for additional compensation for working supervisors upon the admittedly false ground that they did not employ such persons (R. 252; Resp. Exh. 23, R. 764, *supra*, p. 11), and again refused to agree to the provision for meal periods after 5 hours of continuous work, although Barr had written him of the reasonableness of such a proposal (R. 251; Resp. Exh. 10, R. 630). Once again, and for the last time, the Unions asked respondent for a written counter-proposal; again Powell refused, reiterating as his reason that the company did not feel that it had anything to ask of the Unions (R. 501-502). Thereupon the discussions were broken off and were never resumed.

F. The respects in which respondent refused to bargain collectively in violation of Section 8 (5) and (1) of the Act

The nature of the obligation imposed by Section 8 (5) of the Act is stated by the Board in its decision, as follows (R. 55):

Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement by the employer with the accredited representatives of its employees concerning wages, hours, and other conditions of employment. The duty to bargain collectively, which the Act imposes upon employers, has as its objective the establishment of such a contractual relationship to the end that employment relations may be stabilized and obstruction to the free flow of commerce thus prevented; and, indeed, the protection to organization of employees afforded by the first four subdivisions of Section 8 of the Act is intended to make possible and to implement the stabilization of working conditions through collective bargaining conducted between employers and the freely designated representatives of their employees as equals. The duty to bargain collectively is not limited to the recognition of the employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented, and to make contractually binding the understanding upon the terms that are reached.

With this statement the Courts have uniformly agreed. See *H. J. Heinz Co. v. National Labor Relations Board*,

311 U. S. 514, 524-526; *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9); *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 787 (C. C. A. 9), cert. denied 312 U. S. 678; *Globe Cotton Mills v. National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5); *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. (2d) 713, 723 (C. C. A. 3); *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d) 632, 637 (C. C. A. 4); *Wilson & Co. v. National Labor Relations Board*, 115 F. (2d) 759, 763-764 (C. C. A. 8); *National Labor Relations Board v. Pilling*, 119 F. (2d) 32, 37 (C. C. A. 3); *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 131, 134 (C. C. A. 7), cert. denied 313 U. S. 595; *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 885 (C. C. A. 1), cert. denied 313 U. S. 595.

Respondent's persistent refusal to assure the Unions that it would reduce to writing any understandings reached during the course of the negotiations, its refusal to bind itself to recognize the Unions and its refusal to agree to other concededly reasonable proposals, its insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining, its steadfast refusal to make any affirmative efforts to reach an accord with the Unions, and its efforts to induce the employees individually to abandon the strike and to return to work, fully warranted the Board in its finding that respondent's conduct did not measure up to the standard of good faith required by the Act, as we now demonstrate.

1. *Respondent's refusal to assure the Unions that it would reduce to writing whatever understandings were reached*

Powell's refusal at both the September 19 and November 25 conferences with the Unions to assure them that respondent would embody in a signed agreement any understandings that might be reached (*supra*, pp. 6, 12) was a clear breach of its duty to treat with the Unions in good faith. As the Supreme Court declared in *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 526, in support of its holding that one part of the employer's obligations under Section 8 (5) of the Act is to embody whatever understandings are reached in a signed agreement:

* * * A businessman who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

It is immaterial that at the time the Unions sought such assurance no specific terms had yet been agreed upon. As the Circuit Court of Appeals for the Fourth Circuit has held, a refusal to embody in a written contract any agreements which might be reached is "a

pertinent circumstance for consideration on the issue of refusal to bargain as required by the Act, even though no agreements were actually reached.” *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. (2d) 291, 292; *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d) 632, 637.

2. Respondent's refusal to agree to concededly reasonable proposals

Respondent's refusal at the November 12 and December 13 and 16 conferences to agree to bind itself to recognize the Warehousemen (*supra*, pp. 9, 18, 21) further evidences lack of good faith on respondent's part. Respondent's obligation to recognize the Warehousemen is conceded. Recognition, because of its vital importance to the bargaining process, is one of the most frequent subjects of agreement between labor organizations and employers. Respondent's insistence that recognition was not a proper subject of agreement, and that if it should be covered at all in an agreement it should be treated in a preliminary "whereas" clause, can be explained only by a determination to withhold from the Union the full measure of recognition to which it was entitled. By this conduct respondent violated the Act. *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. (2d) 748, 750-751 (C. C. A. 7), cert. denied 313 U. S. 565. As in *H. J. Heinz Co. v. National Labor Relations Board*, 110 F. (2d) 843, 849 (C. C. A. 6), aff'd 311 U. S. 514, respondent's conduct in this respect "may well have left the employees suspicious of its good faith and with a sense of insecurity that does not exist ordinarily when neither

party has reasonable ground to doubt the other's good faith."

Respondent's refusal to agree to a clause requiring it to refrain from antiunion discrimination is likewise demonstrative of a lack of good faith on respondent's part. Its objection that such a matter was "covered by law and is not a subject of agreement" is plainly specious. Such provisions are frequently sought by labor organizations and granted by employers to give employees a feeling of security in the exercise of the rights guaranteed in the Act. The fact that antiunion discrimination is prohibited by law is certainly no reason to deny to employees this additional protection, if they think it necessary or desirable. The employees' experience when they first attempted to organize and exercise their rights under the Act in December 1936 gave them ample reason to believe that the law alone was not complete protection against discrimination at respondent's hands.¹⁷ As with the refusal to agree to sign a written contract and to recognize the Unions, we think the only explanation for respondent's refusal to agree to include this clause in the contract is, as Conciliator Ashe observed, that it "did not want to give the Union the satisfaction of having it there" (Resp. Exh. 23, R. 765). The Board, therefore, was clearly

¹⁷ In the earlier decision involving respondent's Portland mail order house and retail store here involved, which was sustained with minor modifications by the Circuit Court of Appeals for the Seventh Circuit (see note 6, p. 6, *supra*), the Board found that respondent had interfered with self-organization among its employees at the Portland mail order house and store by uttering antiunion statements, employing detectives to investigate union activities, and discharging 23 employees because of their union membership and activities.

justified in finding, as it did (R. 62), that respondent's refusal to agree to the clause prohibiting discrimination constituted a further demonstration of respondent's lack of good faith in dealing with the Unions. Directly in point is *Singer Manufacturing Co. v. National Labor Relations Board*, 119 F. (2d) 131 (C. C. A. 7), cert. denied 313 U. S. 595. In that case, Board findings that the employer's rejection of a clause prohibiting anti-union discrimination upon the ground that such "was its legal duty irrespective of contract" was indicative of a want of good faith were expressly sustained by the Court (119 F. (2d), at 138-139). Cf. *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d) 632, 635, 637 (C. C. A. 4); *National Labor Relations Board v. Boss Mfg. Co.*, 118 F. (2d) 187, 188-189 (C. C. A. 7).

Powell's rejection of the Unions' demand for additional compensation for working supervisors upon the admittedly false ground that respondent did not employ persons in such a capacity (*supra*, pp. 11-12), also warranted the inference that respondent was not treating with the Unions with the sincerity required by the Act. Moreover, Powell's insistence that employees be required to work 6 hours without a meal period rather than 5 hours as sought by the Unions, although Powell's superior, Barr, had advised him that "under normal conditions an employee should not be worked more than five consecutive hours without a meal period," demonstrates its unwillingness to agree to any proposal, no matter how reasonable. As the Court said in *National Labor Relations Board v. Wil-*

son & Co., 115 F. (2d) 759, 763 (C. C. A. 8), "a refusal to do what reasonable and fair-minded men are ordinarily willing to do, upon request, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining."

3. *Respondent's insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining*

Throughout the negotiations respondent took the position that the Unions' proposals, including their demands for a union shop, a seniority rule, and an arbitration clause, were objectionable because they conflicted with "company policy," which in respondent's view was a fixed and inflexible matter and not to be bargained about. Thus, Powell asserted with respect to the Unions' principal demands that "in order to operate * * * the mail order business and the retail store business successfully * * * the ultimate decision * * * should remain in the management" (*supra*, pp. 9-10, see also note 10, p. 10, *supra*). And in connection with the Unions' request for increased wages Powell asserted at the December 16 conference that it was for respondent "to decide whether the employees should have more money" (*supra*, p. 22). The Board very properly regarded respondent's repeated rejection of union proposals on the general ground that they were not consonant with company policy or practice as "illustrative of the respondent's bad faith in the negotiations" (R. 65-66). Respondent was in effect "reserving the right to act unilat-

erally and of its own will alone upon matters involving legitimate collective bargaining," in clear violation of its duty to bargain collectively. *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 131, 136 (C. C. A. 7), cert. denied 313 U. S. 595. Other Courts have condemned as violative of the Act similar attempts to exclude from the area of permissible bargaining certain legitimate subjects of collective bargaining. *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 360; *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 883 (C. C. A. 1), cert. denied 313 U. S. 595; *National Labor Relations Board v. Westinghouse Air-brake Company*, 120 F. (2d) 1004, 1006-1007 (C. C. A. 3); see also *Rapid Roller Co. v. National Labor Relations Board*, 126 F. (2d) 452, 459 (C. C. A. 7).

4. *Respondent's steadfast refusal to make any affirmative efforts to reach an accord with the Unions*

Respondent's persistent refusal to take any initiative in the negotiations to the end that an agreement might be reached clearly warranted the conclusion of the Board (R. 63) that respondent "by its negative attitude was refusing to bargain collectively in good faith." Throughout the negotiations respondent steadfastly refused to submit to the Unions either a contract which was acceptable to it or counterproposals to the various demands of the Unions, although repeatedly requested to do so (*supra*, pp. 7-8, 11-12, 18-19, 22). Even after the Unions had receded from their principal demands and asked respondent "to take each section of the

union's contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract" (*supra*, pp. 18-19), respondent refused to do so. Nor would respondent even agree to enter into an agreement providing simply for the continuation of the existing terms and conditions of employment (*supra*, pp. 19-20). What is more, respondent openly proclaimed throughout the negotiations that it was under no obligation to submit counterproposals, that respondent "was not asking anything from" the Unions and that it was up to the Unions "to make proposals that would please" respondent, and that respondent "had no affirmative duty to do anything" (*supra*, pp. 7-8, 11, 19-20).

This do-nothing philosophy of collective bargaining plainly cannot be reconciled with the requirements of the Act. The objective of the collective bargaining process, as the Courts have repeatedly held, is "an agreement between employer and employees as to wages, hours, and working conditions." *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 523. This objective cannot be achieved if the employer merely sits back and says yes or no to the employees' proposals. It will indeed be a rare case in which a union, casting about in the dark without help or guidance from the employer, happens to hit upon a set of proposals which prove satisfactory to the employer. The process of collective bargaining cannot be made to turn on such rare and far-fetched accidents. As the Board pointed out in its decision, "It takes the affirmative efforts of the two parties, * * * to

make a collective bargain" (R. 63). The Circuit Courts of Appeals have thus uniformly held that where, as here, the employer refuses to submit counterproposals when requested to do so, his refusal may be taken by the Board as evidence of bad faith and an unwillingness to engage in genuine bargaining. "When a counter-proposal is directly asked for, it ought to be made." *Globe Cotton Mills v. National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5). A refusal to submit counterproposals "may go to support a want of good faith and, hence, a refusal to bargain." *National Labor Relations Board v. Pilling*, 119 F. (2d) 32, 37 (C. C. A. 3). Accord: *National Labor Relations Board v. Boss Mfg. Co.*, 118 F. (2d) 187, 189 (C. C. A. 7). The sense of this requirement is apparent. Collective bargaining is a two-way, not a one-way, proposition. It requires a "sincere purpose" on the part of both parties to arrive at a mutually satisfactory agreement (see authorities cited on pp. 23-24, *supra*). This presupposes *bona fide* active efforts on both sides, not one, to discover the terms upon which there will be accord. This was admittedly absent here; it is unquestioned that Barr gave express, written orders to his negotiator, Powell, not to "rush" the bargaining process, or "take the initiative," or "agree" to matters even though there was no dispute as to them, or "volunteer" proposals or counterproposals, or state respondent's position "in writing" (*supra*, p. 8, note 7); the philosophy behind these sabotaging orders was also explicitly declared, to wit, that the "union is seeking" an agreement—respondent

was not! In short, it is abundantly clear that respondent was seeking by the appearance of negotiations, but with no sincere purpose to achieve an agreement, to keep within the letter, while defeating the purpose of the Act. "The studied and meticulous efforts of the respondent, in the course of its negotiations with its employees * * * to be 'within the law', tell their own story. Duties imposed by law cannot be discharged by offering shadow for the substance." *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. (2d) 713, 723 (C. C. A. 3). Respondent's violation of the Act is manifest.

Further, in refusing to embody the existing terms and conditions of employment in a binding agreement when the Unions asked whether it would do so (*supra*, pp. 19-20) respondent undeniably established its lack of good faith. If the employer finds himself unpersuaded by the arguments advanced in support of the employees' demands, the very least he must do, when request is made, is to offer to enter into an agreement providing for the maintenance of the *status quo*. *National Labor Relations Board v. Express Publishing Co.*, 111 F. (2d) 588, 589 (C. C. A. 5); *Ritzwoller Co. v. National Labor Relations Board*, 114 F. (2d) 432, 436 (C. C. A. 7). Respondent was not even willing to do this.

5. *Respondent's efforts to induce the employees individually to abandon the strike and to return to work*

Although respondent had accepted the Unions as the representatives of its employees and knew that the

Unions were taking concerted action against it, as was their unquestioned right under the Act, respondent by means of threats and solicitation sought to induce the striking employees individually to return to work (*supra*, pp. 15-17), thereby violating, as the Board found (R. 67), "its obligation to deal with the Unions as the exclusive representatives of the employees." That this effort to "undercut" the authority of the Unions to act as the exclusive bargaining agents of the employees "reflects on its good faith in the collective bargaining negotiations," as found by the Board (R. 67), is not open to question. See *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 21 (C. C. A. 9); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), cert. denied 304 U. S. 576; *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 883-885 (C. C. A. 1), cert. denied 313 U. S. 595; *Ritzwoller Co. v. National Labor Relations Board*, 114 F. (2d) 432, 436 (C. C. A. 7).

In view of respondent's persistent refusal to assure the Unions that it would "honor with its signature" any agreement reached with them; its stubborn resistance against agreeing to do merely what the law requires it to do, i. e., to recognize the Unions and to refrain from discrimination against their members; its failure to agree to concededly reasonable proposals, or even to agree to a contract providing for the continuation of existing terms and conditions of employment; its insistence upon determining unilaterally matters

which are legitimate subjects of collection bargaining; its obdurate refusal to submit written counterproposals, its insistence that it was not required to make an affirmative effort to reach an accord with the Unions, and its view that the Unions must continue to submit proposals until they found one that would "please" respondent; the dilatory tactics adopted in connection with the Unions' request for a conference with policy-making officials of respondent in Chicago; and its effort to "undercut" the authority of the duly chosen bargaining representatives of the employees by going to the employees themselves with a request that they return to work—on all these bases the Board very properly found (R. 68) that respondent "did not, as it was bound to do 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and sincere desire to reach an agreement in a spirit of amity and cooperation.' " Indeed, the Board's conclusion (R. 68) is inescapable that respondent "while going through the motions of meeting and conferring with the Unions," had no intention of reaching an agreement with the Unions, regardless of terms; respondent was engaging in "mere shadow-boxing." See *Stonewall Cotton Mills v. National Labor Relations Board*, decided June 3, 1942, 10 L. R. R. 514 (C. C. A. 5). The Board was amply justified in finding, on this evidence, that respondent had violated Section 8 (5) and (1) of the Act.

In view of the whole course of the negotiations the Board properly concluded that the strike, called as it was shortly after the union representatives expressed the view that they "were being stalled" and at a time

when their request for a further meeting had been ignored for several days, was caused and thereafter prolonged by respondent's refusal to bargain collectively in good faith with the Unions (R. 68). This conclusion is buttressed by the Unions' efforts after the strike began to find a basis for an agreement with respondent. Receding from their principal demands, that is, for a union shop, a seniority rule, and an arbitration clause (see p. 21, *supra*), the Unions asked respondent literally to write its own contracts with them, but to no avail. In this situation it is idle to urge, as did respondent before the Board, that the Unions were striking solely to enforce their demand for a union shop. Indeed, on all the facts, it is difficult to see how the Board could have reached any other conclusion than it did (R. 68), namely, that "a substantial cause of the strike and its prolongation was the justified feeling of the Unions that the respondent was 'stalling'; that is, not fulfilling its obligation to bargain collectively as required by the Act."

Disregarding the unanimous array of authorities against it, respondent contends that good faith is not an element of the duty to bargain collectively.¹⁸

This contention is completely foreclosed by the authorities under the Act (see pp. 23-24, *supra*) and by the authorities under the analogous Railway Labor Act

¹⁸ Thus respondent asserted in its brief before the Board, a copy of which has been filed herein for the convenience of the Court, that:

" * * * The Congress further assumed that, by placing upon employers the simple requirement of meeting with the representa-

as well. In *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 131 (C. C. A. 7), the employer vigorously urged precisely this contention both in its main brief and in its reply brief. The Court squarely rejected the contention, holding:

* * * We think the Board had full authority to determine as a fact whether petitioner was acting in good faith or whether its actions amounted to a mere superficial pretense at bargaining—whether it had actually the intent to bargain, sincerely and earnestly—whether the negotiations were captious and accompanied by an active purpose and intent to defeat or willfully obstruct real bargaining (119 F. (2d), at p. 134).

The employer in the *Singer* case raised this same contention and stressed its importance in the administration of the Act in its petition to the Supreme Court for

tives of their organized employees, the attainment of industrial peace through agreements would be furthered. As one court has said:

“The Act * * * meant to give to the employees whatever advantage they would get from collective pressure upon their employer; and the question here is what are the fair implications of that grant.”

Art. Metals Constr. Co. v. N. L. R. B. (1940, C. C. A., 2d cir.), 110 F. (2d) 148, at p. 150.

“The ‘implications of the grant’ do not in any way include the imposition of a greater duty upon the employer than to participate in the *procedure* established by law. To imply that the Congress undertook the superhuman task of legislating a state of mind for all employers, or that the Congress intended to set up indefinite and imponderable standards of conduct described by such words as ‘sincerity’ and ‘good faith,’ is to go far beyond the reasonable ‘implications of the grant,’ and to convert an intelligible and easily-administered law into an instrument of potential and terrifying abuse” (Resp. brief before the Board, pp. 19–20).

a writ of certiorari; nevertheless, the petition was denied by the Court (313 U. S. 595). The company's petition for a rehearing again raising this issue was also denied by the Supreme Court (62 S. Ct. 55). The Supreme Court rejected an identical contention in a case arising under the Railway Labor Act. In *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, the Court reviewed a decree requiring the railroad company to "treat with" the agent of its employees and to "exert every reasonable effort to make and maintain agreements." The company insisted that its obligation to bargain was not a fit subject for a decree in equity because negotiation depends upon desires and mental attitudes which are far beyond judicial control. The court summarily disposed of this contention, saying (at p. 550): "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees."

With respondent erroneously taking the position that Section 8 (5) of the Act places upon employers only "the simple requirement of meeting with the representatives of their organized employees" (*supra*, p. 36, note 18), and that the Board may not inquire into an employer's sincerity and good faith in the negotiations, it is readily understandable why respondent's conduct throughout the negotiations did not measure up to the standard of good faith which the Courts have universally held to be required by the Act.

**G. Respondent's interference, restraint, and coercion in violation of
Section 8 (1) of the Act**

It is not open to doubt, particularly inasmuch as the strike was caused by respondent's unfair labor practices, that, as the Board found (R. 74), "respondent, by communicating with the employees directly through its supervisory employees, and by stating to the employees that 'we are operating tomorrow as usual and your job is open for you if you want to come in,' was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity." By such solicitation and by McGowan's threatening statements to his subordinates (*supra*, pp. 15-17), respondent plainly interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. See the authorities cited on p. 24, *supra*, and *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22-23 (C. C. A. 9).

POINT II

The Board's order is valid and proper under the Act

The provisions of the order requiring respondent to cease and desist from the specific unfair labor practices found (paragraphs 1 (a), (b); R. 80-81) are of settled validity. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Equally valid under the circumstances of this case are the provisions of the order requiring respondent to cease and desist from in any other manner interfering with its employees in the exercise of their right to self-organization and collective bargaining (para-

graph 1 (c); R. 81). Respondent not only refused to bargain collectively in good faith with the Unions in violation of Section 8 (5) and 8 (1) of the Act, but also, in further and independent violation of Section 8 (1) sought to induce the striking employees to desert the Unions and abandon their concerted activities, and used threats of discharge as well as of a plant shut-down. In this situation, where separate and independent violations of Section 8 (1) are found, the doctrine of *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, has no application, and the Board properly entered the general cease and desist order. *National Labor Relations Board v. Hollywood-Marxwell Co.*, 126 F. (2d) 815, 819 (C. C. A. 9); *National Labor Relations Board v. Pacific Gas and Electric Co.*, 118 F. (2d) 780, 789 (C. C. A. 9); cf. *National Labor Relations Board v. National Motor Bearing Co.*, 105 F. (2d) 652, 660 (C. C. A. 9).

The provisions of the order requiring that respondent offer reinstatement with back pay to those employees who went on strike on December 7, 1940, or thereafter and who have applied for and been denied reinstatement; and that respondent, upon application, offer reinstatement to those strikers who have not heretofore applied for reinstatement, with back pay from any denial of their applications (paragraphs 2 (a), (b), (c), and (d); R. 82-83) are the normal remedial provisions entered in cases where strikes are caused or prolonged by unfair labor practices. Their propriety has been uniformly sustained by the Courts. *National Labor Relations Board v. Grower-Shipper Vegetable Association*, 122 F. (2d) 368, 378 (C. C. A.

9); *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. denied 304 U. S. 575; *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9); *Republic Steel Corp. v. National Labor Relations Board*, 107 F. (2d) 472, 478 (C. C. A. 3), cert. denied on this point 309 U. S. 684.

The validity of the provision directing respondent to bargain collectively with the Unions (paragraph 2 (f); R. 84) is not open to question. *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512; *National Labor Relations Board v. Bradford Dyeing Association*, 310 U. S. 318, 339-340.

CONCLUSION

It is respectfully submitted that the National Labor Relations Act has been validly applied to respondent, that the Board's findings are supported by substantial evidence, that its order is valid and proper in all respects, and that a decree should issue affirming and enforcing said order in full, as prayed in the Board's petition and request for enforcement.

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JULY 1942.

APPENDIX

The relevant provisions of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*, are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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Petitioner,

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PANY,

Respondent.

MONTGOMERY WARD & COM-
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v.

NATIONAL LABOR RELATIONS
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Upon Petition for Enforcement
and Upon Cross-Petition for Re-
view and to Set Aside an Order
of the National Labor Relations
Board.

**BRIEF OF MONTGOMERY WARD & CO.,
INCORPORATED, AS RESPONDENT TO
PETITION FOR ENFORCEMENT.**

FILED

AUG - 3 1942

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THE PARTIES.

Hereafter in this brief we shall refer to the petitioner and cross-respondent, National Labor Relations Board, as the "Board"; to the respondent and cross-petitioner, Montgomery Ward & Co., Incorporated, an Illinois cor-

poration, as "Wards"; to the Warehousemen's Union, Local 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, as the "Warehousemen"; to the Retail Clerks' International Protective Association, Local No. 1257, as the "Clerks"; and to the latter two organizations collectively as the "Unions".

THE TERMS USED.

Hereafter in this brief we shall refer to the National Labor Relations Act (an Act of Congress approved July 5, 1935, c. 372, 49 Stat. 449-457, U. S. C. A., Title 9, Sections 151-166) as "the Act"; to all forms of the closed shop, whether called "union shop", "union preference shop", or something else, as the "closed shop"; to the brief which the Board filed with this Court in support of its Petition for Enforcement of an Order of the National Labor Relations Board as the "Board's Brief"; and to the brief which Wards filed with this Court in support of its Cross-Petition for Review and to Set Aside an Order of the National Labor Relations Board as "Wards' Brief as Petitioner".

STATEMENT OF THE CASE.

Nothing need be added here to the Statement set forth in Wards' Brief as Petitioner, except to call the attention of this Court to the many misstatements of fact in the Board's Brief which are discussed in Proposition VIII of this brief.

SUMMARY OF THE ARGUMENT.

Wards contends that the Board's Decision and Order should either be set aside completely or the case reversed and remanded to the Board in order that the errors of law embedded in the Board's Findings and Conclusions be corrected. Wards' position is based on the following points:

1. When an administrative agency misinterprets the statute under which it acts, or when an administrative agency makes errors of law which may have materially affected its findings, or when an administrative agency rests heavily upon a misconstruction of the law or upon unsupported findings, or when an administrative agency weighs the evidence under a mistaken view of the law, or when the findings of an administrative agency leave the reviewing court in doubt as to whether the agency has made its findings under a proper view of the law, the decision and order of the administrative agency should be remanded for further proceedings under a correct view of the law.
2. A remand for such reasons is distinct from the setting aside of an order because the record completely lacks substantial evidence to support it, and such a remand may be ordered even without examination to discover whether the record contains substantial evidence which would support a finding or conclusion made under a proper view of the law.
3. The Board's Decision and Order in the present case are based upon definite misconstructions of the statute in that certain statements and actions of Wards in the course of negotiations are improperly held to amount *per se* to a refusal to bargain.

4. The Board's Decision and Findings show that the Board was attempting to usurp the power of passing upon the reasonableness of the terms upon which Wards was insisting in the course of negotiations, and thus to exercise a managerial authority.
5. The Board's Conclusions rested heavily upon findings which were entirely unsupported or clearly erroneous.
6. Partly as a result of these errors of law, not a single one of the Findings upon which the Board bases its Conclusions is supported by substantial evidence.

In addition to these contentions, we shall point out to this Court that Board's counsel in the Board's Brief have attempted to prejudice this Court by reference to matters which were not introduced into evidence before the Board and which are of such a character as to evidence bias and prejudice on the part of the Board. We also propose to show to this Court that the Board's Brief is replete with misstatements of the facts and misrepresentations of the evidence.

ARGUMENT.

I.

The Power of This Court to Deny Enforcement to Orders of the National Labor Relations Board Because of Errors of Law Is Not Limited to Questions of Lack of Evidence.

The Board's brief in the present case argues as if the sole issue before this Court were whether the evidence substantially supports the Board's findings of fact. This is one of the issues, but it is not the only one and perhaps not the most important. While Wards earnestly contends that the Board's findings completely lack substantial support in the record, Wards also submits that the order should be denied enforcement for other reasons, equally compelling, and possessing far more general importance than the particular questions of fact raised by a single case.

Because of the importance of these other issues, the discussion of them may profitably be prefaced by a consideration of principles which are neither new nor debatable, but which must be constantly remembered in a proper analysis of this case.

The Board's order is of course final "as to the facts, if supported by evidence" (Section 10, paragraphs (e) and (f) of the Act); but this finality no more extends to issues which present questions of law than in the case of orders promulgated by other administrative agencies. The Supreme Court has given us a succinct description of the general types of so-called "questions of law" which are inherent in all administrative decisions:

“Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision.”

Federal Radio Com’n v. Nelson Bros., (1935),
289 U. S. 266, at p. 276; 53 S. Ct. 627, at p.
632; 77 L. Ed. 1166.

From this general statement of what are “appropriate questions for judicial review”, the following propositions which are pertinent to the present case may be deduced:

A. If the Board incorrectly interpreted the statute administered by it, the order should be set aside.

The interpretation of a statute is obviously a question of law and not a question of fact. Hence the Court which reviews an administrative order is never bound by the interpretation adopted by the administrative agency:

“That there may be some degree of finality in a finding of fact by an administrative body may be conceded, but such finding cannot take from the courts the power to construe a statute and determine whether it covers such a situation as the facts present.”

Washburn v. Commissioner of Internal Revenue,
(8th cir.) 51 Fed. (2d) 949 at p. 951.

“The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made.”

Helvering v. Rankin, (1935) 295 U. S. 123, at p.
131; 55 S. Ct. 732, at p. 736; 79 L. Ed. 1343.

What Congress meant by the phrase "bargain collectively" is a question of statutory definition; it is a proper subject for judicial decision and administrative determination involving the definition of this phrase is neither final nor binding in this Court. Wards contends that the Board improperly interpreted this phrase, and that present case improperly interpreted this phrase, and that this error of law can only be corrected by setting aside the Board's order.

B. If the Board's ultimate conclusions involved mixed questions of law and fact in which were embedded legal questions improperly decided, the order should be set aside.

The ultimate finding of an administrative agency may involve both a question of fact and an interpretation of the law; such findings are said by the courts to give rise to a "mixed question of law and fact" which is subject to judicial review: *U. S. v. Idaho*, (1936) 298 U. S. 105, at p. 109, 56 S. Ct. 690 at p. 692; 80 L. Ed. 1070.

"* * * The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board. * * *"

Helvering v. Tex-Penn Oil Co., (1937), 300 U. S. 481, at p. 491, 57 S. Ct. 569, at p. 574, 81 L. Ed. 755.

Because the Board based its ultimate finding that Wards failed to bargain collectively upon an interpretation of the Act which led the Board to regard certain conduct as *per se* a failure to bargain, the Board's ultimate finding or conclusion in the present case (R. pp. 68-69) involved a mixed question of law and fact and

amounted, in the language of the Supreme Court, to “an administrative determination in which is embedded a legal question open to judicial review” (*Fed. Commun. Com’n v. Pottsville Broadcasting Co.*, (1940) 309 U. S. 134, at p. 145, 60 S. Ct. 437, at p. 442, 84 L. Ed. 656).

C. If the evidence was weighed by the Board under a mistaken view as to the extent of its powers or as to the meaning of the Act, the order should be set aside.

Judicial review of the legal questions embedded in an administrative determination is not limited to the final application of the law to the totality of facts found, but extends wherever a mistaken view of the law has influenced the final conclusion. If in the present case the Board weighed the evidence and made its “factual inquiries and findings * * * under a *view of the law*” which is not the view taken by this Court, the Board’s findings “are quite likely not in all respects those which the Board would have made had it proceeded with knowledge” of the correct view of the law, and the case should be remanded: *District of Columbia v. Murphy*, (1941) 314 U. S. 441, at p. 458; 62 S. Ct. 303, at p. 311; 86 L. Ed. 277.

D. If this Court has any doubt as to the correctness of the Board’s view of the law, the order should be set aside.

A jury’s verdict in a case at law—its finding of fact—is, if supported by evidence, just as final as the findings of fact made by an administrative agency. The sufficiency of the evidence to support the findings of a jury is tested by the same tests as are applied to the findings of an administrative agency: *NLRB v. Columbian Enameling and Stamping Co., Inc.*, (1939) 306 U. S. 292, at p. 300, 59 S. Ct. 501, at p. 505, 83 L. Ed. 660.

When a case at law is reviewed by an appellate court, the "view of the law" under which the jury's findings were made appears in the instructions given by the trial court. Material errors in the instructions are grounds for reversal, since the jury may well have been influenced by such an erroneous view of the law.

The court which reviews an order of an administrative agency must also be informed as to the theory of the law under which the agency acted. The findings and decision of the agency must show what "view of the law" was taken, because, as the Supreme Court has said, speaking of an administrative order:

"We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

U. S. v. C. M., St. P., and P. R. Co., (1935) 294

U. S. 499, at pp. 510-511, 55 S. Ct. 462, at p. 467, 79 L. Ed. 1023.

When the findings of the administrative agency do not clearly disclose the view of the law under which the findings were made, the administrative agency has failed to make essential "basic" findings, and the case must be remanded. Mr. Justice Learned Hand has said:

"What findings are 'basic' is a practical matter; those are such which we need to ascertain *on what legal theory* the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside." (Italics added.)

Balt. & O. R. Co. v. U. S., 22 Fed. Supp. 533, at p. 537.

If this Court is unable to ascertain with certainty the "legal theory" as to the nature of collective bargaining held by the Board;—if this Court no more than suspects that the Board acted under an erroneous view as to its

powers and the scope of the Act—the case should be remanded to the Board so that the Board can supply the deficiency and make the “findings” necessary for a proper review of the legal issues involved.

Recent decisions of the Supreme Court have shown that the courts should be alert to take such action as soon as doubts have arisen as to the legal theory under which an administrative agency has acted.

In *Phelps Dodge Corp. v. NLRB* (1941), 313 U. S. 177, at p. 197, 61 S. Ct. 845, at pp. 853-4 (85 L. Ed. 1271), the Court said:

“The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the board and the procedure by which it must be asserted, and has charged the federal courts with the duty of reviewing the Board’s orders, it will avoid needless litigation and make for effective and expeditious enforcement of the Board’s order to require the Board to disclose the basis of its order.”

One of the reasons for remand in *Dist. of Columbia v. Murphy*, (1941) 314 U. S. 441 at p. 458, 62 S. Ct. 303 at p. 311; 86 L. Ed. 311, was that the findings were “in some respects ambiguous.”

In *NLRB v. Virginia Electric & Power Co.*, (1941) 314 U. S. 469; 62 S. Ct. 344; 86 L. Ed. 306, the Board specifically found, as to certain advice given employees by their employer, that the employer “thereby interfered with” his employees. The findings thus parallel those in the present case where the Board characterized certain specific acts as amounting *per se* to a violation of the Act. The Supreme Court said (314 U. S. at p. 479; 62 S. Ct. at p. 349):

“It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone.”

Without deciding whether the other evidence in the record might support the ultimate findings, the Court ordered the case remanded to the Board because

“We are not sufficiently certain from the findings that the Board based its conclusion * * * upon the whole course of conduct.”

and because

“Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful.”

The legal theory of the Board—whether the advice was *per se* coercion or whether the circumstances under which the advice was given made it coercion—was the point which the Court regarded as “doubtful”; and this doubt required a remand of the case.

A few months after the *Virginia Electric* case was decided, the Supreme Court held as to another agency that, when it was “not satisfied that the Commission applied the proper criterion in reaching its conclusion,” and when “as seems likely here, an erroneous statutory construction lies hidden in vague findings,” the agency’s order should be set aside for insufficiency of findings: *U. S. v. Carolina Freight Carriers Corp.*, (Mar., 1942) U. S., 62 S. Ct. 722, at pp. 727, 730; 86 L. Ed. 622.

In a companion case, the Supreme Court added that, because the agency "placed considerable reliance" on one of its own decisions which expressed an erroneous view of the law, and because "the influence of that view seems to have permeated the findings," the case "should be remanded * * * so that the basic or essential findings required * * * may be made": *Howard Hall Co. v. U. S.*, (1942) U. S., at p.; 62 S. Ct. 732, at p. 735; 86 L. Ed. 639.

Even if Wards is unable to do more than to raise a doubt in the minds of this Court as to the effect on the Board's ultimate conclusions of some unsupported or improper findings, or even if Wards is unable to do more than cause this Court to question whether the Board's interpretation of the Act was a proper one, the order should be set aside and the case remanded to the Board for clarification and elimination of all doubts. This Court must be presented with findings which make it "sufficiently certain" that the Board acted under a correct view of the law.

II.

The Board Incorrectly Interpreted the Statutory Requirement That an Employer Bargain Collectively.

The errors of law which the Board committed fall into two classes:

1. misconstructions of the Act which are clearly stated and appear on the face of the Board's opinion;
2. misconceptions of the law which, while not baldly stated in so many words, are implicit in the language and the reasoning of the Board; in other words, "erroneous statutory constructions hidden in vague findings."

This proposition discusses certain errors of law which fall within the first of these classifications.

Wards' Brief as Petitioner pointed out a number of respects in which the Board misinterpreted the Act. To avoid repetition, these misinterpretations are simply listed here, with a reference to the place in the Board's decision where they appear and a reference to the pages in Wards' Brief as Petitioner on which they are discussed.

Upon these points, the Board has stated its position without equivocation. These errors alone demonstrate that the Board acted under an erroneous "view of the law," and they require reversal just as much as the erroneous views of the Board in *Texas Co. v. NLRB*, (9th cir.), 120 Fed. (2d) 186, caused this Court to remand the entire proceeding.

A. The Board incorrectly interpreted the Act as requiring an employer to make concessions or at least to be willing to make concessions.

In defining the duty to bargain, the Board quoted its own previous holding that an employer must show a "willingness to modify demands" (R. 56). This definition of the duty to bargain would establish the guilt of an employer who "demanded" in negotiation that the *status quo* be continued, and who did not "modify" or exhibit a "willingness to modify" this position. Since the only modification possible would be a concession to the union demands, guilt would result from a failure to make concessions.

The duty to bargain, so interpreted, becomes the duty to make concessions. This the Act was never intended to require. (The authorities for this proposition are collected in Wards' Brief as Petitioner, pp. 25-29.)

That the Board "placed considerable reliance" on its previous decision so defining the duty to bargain appears

from the manner in which the Board condemned Wards for conduct which amounted simply to a refusal to make certain concessions demanded by the unions (See Ward's Brief as Petitioner, pp. 50-52).

B. The Board incorrectly interpreted the Act as imposing an absolute duty upon an employer, whenever requested by the union, to contract to do that which he is compelled to do anyway.

The Board held that the law placed on Wards an "obligation to 'bind itself to give exclusive recognition'" to the Union (R. 61). So interpreting the law, the Board held that Wards' insistence that recognition already given be simply recited in a preamble to the proposed labor contract "did not satisfy the respondent's obligation" (R. 61).

The same interpretation of the Act led the Board to hold, further, that a refusal, in advance of agreement, to discuss the question whether any agreement reached should be reduced to writing and signed was "tantamount to a refusal to bargain" (R. 59-60); and to hold further that Wards' refusal to insert a clause promising not to disobey the injunction of the Act against union discrimination "demonstrated its refusal to bargain collectively" (R. 61-62). (Footnote 1).

1. In its attempt to justify the Board's holding on this point, counsel for the Board misrepresent the purport of the holding in *Singer Mfg. Co. v. NLRB*, (7th cir.), 119 Fed. (2d) 131, (cert. den. 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549), saying:

"In that case, Board findings that the employer's rejection of a clause prohibiting anti-union discrimination upon the ground that such 'was its legal duty irrespective of contract' was indicative of a want of good faith were expressly sustained by the Court, 119 Fed. (2d) at 138-139." (Board's brief, p. 28)

In the *Singer* case, the Court reviewed the employer's position on all the clauses in the contract submitted by the union, pointing out that the employer insisted any contract should permit it to "change its practice whenever in its opinion such action seemed necessary" (p. 136), that "the circumstances * * * indicated * * * a further intent to

The correct view of the Act is that it contemplates agreement upon matters that might otherwise be left to the unilateral determination of the employer; and that legal duties which cannot be avoided by a labor contract are not proper subjects to be included. To construe the Act as imposing an absolute duty to agree to do what must be done in any event is absurd, since no useful purpose would be served. The Act does not contemplate compelling conduct which has no bearing on industrial peace. Strikes are not averted by promises to do what the law compels the employer to do in any event; and strikes never occur simply because of a refusal to make this kind of a promise. (This point is discussed on p. 44 of Wards' Brief as Petitioner.)

refuse to include in any contract a proper bargaining clause as to wages" (p. 137), and that the employer insisted "upon express reservation of the right to determine terms of employment, limited in no way by provision for collective bargaining with reference thereto" (p. 138). Hence there was evidence that the employer had "sealed his mind against the thought of entering into an agreement" (p. 139).

The Court pointed out that the anti-discrimination clause prohibited strikes by the union and lockouts by the employer as well as discrimination (see 24 NLRB 444, at p. 467). The fact which the Court emphasized was that, "when United abandoned its request for a non-discrimination pledge by petitioner the latter persisted that United obligate its members as it had suggested" by a no-strike clause (119 Fed. (2d) at p. 138). Thus the fault of the employer lay in its insistence that the union bind itself in a field where the employer refused to be bound.

This was also the ground on which the Board itself based its conclusions. Pointing out that the no-lockout clause went further than to prohibit that which the law prohibited (24 NLRB at p. 467), the Board said:

"Moreover, whereas the clauses proposed by the United proceeded upon the recognition of the equal * * * responsibility of both * * *, the respondent, on the other hand, in effect insisted that the United accept an inferior position by agreeing to a contract which placed restrictions only on the United."

(24 NLRB at p. 467)

Neither the Board nor the Court held that the rejection of the anti-discrimination clause was in itself evidence of a refusal to bargain, and hence the Board's brief clearly misrepresents the purport of the holding.

C. The Board incorrectly interpreted the Act as prohibiting an employer from simply telling employees not reporting for work on the day of a strike that the plant was operating and their jobs were open.

The Board held that certain telephone calls, limited to the single message that the struck plant was continuing operations and that the employees' jobs were open, were in themselves a violation of the Act:

"We find that by such solicitation and by undercutting in this manner the authority of the Unions to act as the exclusive bargaining agents of the employees * * * the respondent has interfered with, restrained, and coerced its employees" (R. 74).

The Board further concluded that:

"The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67).

In the absence of any showing that the telephone calls actually induced a single employee participating in the strike to return to work, (*Stonewall Cotton Mills, Inc. v. NLRB*, (5th cir.), June 3, 1942, Fed. (2d), at p., 10 Lab. Rel. Rep. 514), and in the absence of any semblance of threat or inducement, (Footnote 2) an employer's message to his employees, stating facts and no more, is clearly within the legal province of the employer: *Wilson & Co. v. NLRB*, (7th cir.), 120 Fed. (2d) 913 at p. 919. To interpret the Act as prohibiting an employer from giving such a message to his employees is to disclose a complete misconception on the part of the Board of the extent of the duties imposed by the Act. (This point is also discussed on pp. 60-62 of Wards' Brief as Petitioner.)

2. The Board misrepresents the facts by speaking of Wards' "effort to 'undercut' the authority of the duly chosen bargaining representatives of the employees with a request that they return to work" (Board's brief, p. 35). No such "request" was made, and the instructions expressly prohibited it (R. 69-70).

Wards contends that each of these three incorrect interpretations of the duties imposed by the Act was a material factor in the ultimate conclusion which the Board drew. The argument does not, however, stand or fall on a showing that the Board was wrong in all three respects. If this Court should agree that the Board's view of the law was erroneous in a single one of these three respects, the order should be set aside and the case remanded to the Board, since to quote the language of the Supreme Court:

“ * * * the factual inquiries and findings of the Board, made under a view of the law not our own, are quite likely not in all respects those which the Board would have made had it proceeded with knowledge of our opinion. * * * ”

District of Columbia v. Murphy, (1941) 314 U. S. 441, at p. 458, 62 S. Ct. 303, at p. 311; 86 L. Ed. 277.

III.

The Board's Decision and Order Disclose That the Board Sought to Exercise a Managerial Authority Not Conferred on It By Statute.

The misinterpretations of the Act just discussed are clear and unambiguous. The Board's errors of law do not end with them, however; other and equally improper views of the law are disguised by general phases or are implicit in adjectives used to characterize conduct. They illustrate what the Supreme Court meant when it spoke of “an erroneous statutory construction” which “lies hidden in vague findings”: *U. S. v. Carolina Freight Carriers Corp.*, (Mar., 1942) U. S., at p., 62 S. Ct. 722, at p. 729; 86 L. Ed. 622.

In Ward's Brief as Petitioner, the Congressional reports and the decisions were analyzed to show that the

Board may not pass judgment on the reasonableness of the terms on which an employer insists. To do so would require an employer to offer such terms as meet with the approval of the Board and would convert the Act into one requiring compulsory arbitration. Whatever the merits of compulsory arbitration, if any, may be, the Congress did not intend, and the decisions do not permit, an interpretation of the Act converting it into one compelling such arbitration. The Board consequently has no authority to approve or disapprove the terms offered by an employer:

“The law does not authorize the Board * * * to make collective bargaining contracts nor to prescribe what shall be written in them.”

NLRB v. Whittier Mills Co., (6th cir.) 123 Fed. (2d) 725, at p. 728.

To state the point succinctly, in the words of this Court,

“The act does not vest in the Board managerial authority.”

NLRB v. Union Pac. Stages, (9th cir.) 99 Fed. (2d) 153, at p. 177.

Obscured by the vagueness of the Board's language, this is exactly the authority which the Board sought to exercise in the present case.

The Board, in defining the duty to bargain, stated that

“The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind” (R. 55).

Elsewhere the Board spoke of the

“Obligation ‘to discuss fully and freely * * * claims and demands and, when these are opposed, to justify them on reason’ ” (R. 66).

These statements are not necessarily incorrect in themselves; they find an echo in remarks made *obiter* by the Courts (Footnote 3). But they are ambiguous, and the application of them shows that this ambiguity conceals an erroneous view of the law.

Wards' Brief as Petitioner has shown that the particular "open and fair mind," the "sincere negotiations," or the "good faith" required of an employer embraces no more nor less than a willingness to enter into a binding trade agreement on acceptable terms if any are discovered, and to take the necessary steps of recognition, discussion, and acquiescence in acceptable terms (Wards' Brief as Petitioner, pp. 33-36, and the cases there cited).

The employer must "justify his position on reason"; that is, he must advance the reasons for his position so that the unions may have the opportunity to meet his arguments. But he need not at his peril advance reasons which convince the Unions or the Board. An employer can remain unpersuaded to change his position even by arguments which the Board may believe to be sufficient, since the statute does not require an employer

"to make a collective contract hiring individuals on any terms other than it may by unilateral action determine."

NLRB v. Knoxville Pub'g Co., (6th cir.) 124 Fed. (2d) 875, at p. 883.

3. The second passage purports to be a quotation from *NLRB v. Geo. P. Pilling & Son Co.*, (3d cir.), 119 Fed. (2d) 32, at p. 37. In that case according to the Court: "At no time did he [the employer] explain his views" (p. 35). Of course, the duty to bargain includes the duty to explain the terms upon which the employer will insist; to that extent he must "justify on reason" the position he takes. But the soundness of the reasons advanced in explanation of his stand is no concern of the Board.

The Board, however, regarded the phrases which it quotes as licensing it to pass judgment, not on the fair-minded willingness of Wards to contract on acceptable terms, but on the fairness of the terms which Wards would accept. That the Board acted on the assumption that it possessed such a managerial authority is disclosed by several passages in the Board's decision:

1. The Board made a point of the supposed fact that "Powell was troubled about the reasonableness of the position he had taken" (R. 42). If a difference of opinion between Powell and Barr on such a matter existed, it was completely irrelevant except upon the assumption that the "reasonableness" of the position was an issue before the Board. The Board's mention of the point betrays its concern over a matter which was not its business.
2. In discussing the insistence of Wards that recognition be recited rather than promised, the Board said:
"But as Ashe, the Department of Labor Conciliator, pointed out, the only explanation for the respondent's refusal to agree to include this clause in its contract was that it 'merely did not want to give the Union the satisfaction of having it there' " (R. 61).

The Board thus adopted the hearsay of Ashe's supposed opinion as part of its own "concluding findings." Thus the Board based its ultimate conclusion in part upon its disapproval of the supposed reasons for a management decision as to the terms on which the employer would insist.

3. The next sentence in the Board's opinion quotes *Wilson & Co. v. NLRB*, (8th cir.), 115 Fed. (2d) 759, as holding that

"A refusal to do what reasonable and fair-minded men are ordinarily willing to do, upon request, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining."

115 Fed. (2d) at p. 763.

This is the old trick of taking a *part* of a sentence out of its context and reading into it a meaning it was never intended to have. The *Wilson* case dealt with a refusal to reduce agreements reached to written form. The refusal to sign an agreement reached is the "refusal to do what reasonable and fair-minded men are ordinarily willing to do" to which the court refers; but this is the court's *characterization* of the refusal, and not the *reason* why the refusal "may be taken to be an indication of a lack of proper intent."

That reason is fully stated. The legislative intent is that "contracts satisfactory to both employer and employee may be reached," but "agreements can hardly be said to be satisfactory when the evidence of their existence must be made to depend upon the uncertain memories of parties." (115 Fed. (2d) at p. 763.)

The *Wilson* opinion thus says in unmistakable words that the contracts to be reached are those "satisfactory to both employer and employee." Whether or not the terms are in fact "satisfactory" is a proper inquiry; whether or not the terms insisted upon appear to the Board to be reasonable is not.

The Board reveals its misconception of the law by its misuse of this quotation (Footnote 4).

4. The Board also said:

“We are satisfied upon this record that the respondent, in thus relying simply on existing practice as a reason for not agreeing to union proposals, failed to fulfill its obligation * * *” (R. 66).

The Board thus evidences its preoccupation with the “reason” for Wards’ insistence on maintaining the *status quo*, and follows this statement with the passage previously quoted about an employer’s supposed obligation to “justify” his position “on reason.”

5. The Board also listed among the “respects” in which Wards failed to bargain a supposed difference between Barr and Powell over the union demand for no work in excess of five hours without a meal period (R. 66-67). Since the Board admits that “Powell at all times insisted that the respondent’s past policy * * * be followed,” the supposed difference can have no significance whatsoever unless the reasonableness of the position taken be an issue (Footnote 5).

4. The *Wilson* opinion clearly shows that the court did not differ with the definition of the “good faith” and “sincerity” required by the Act which Wards has advanced to this Court:

“We do not believe that negotiations which are carried on without any intention of reaching a definite agreement or of reducing to writing any agreement that may be reached constitute a full compliance with the act.”

(115 Fed. (2d) 759)

The “good faith” required, is, as we have said, no more nor less than a willingness to agree when terms are in fact satisfactory and acceptable; but the reasons why they may be unacceptable or unsatisfactory are not the subject of inquiry by the Board.

5. The Board’s brief referred to this point as an illustration of Wards’ supposed refusal to agree to “concededly reasonable proposals”, and stated that Powell’s position “demonstrates its unwillingness to agree to any proposal, no matter how reasonable” (Board’s brief, p. 28). Since the proposal was a demand for a concession, the Board’s argument is that an employer refuses to bargain if he rejects a demand for a concession which the Board believes to be reasonable.

These five passages from the Board's decision, read in the light of the Board's definition of the duty to bargain, at least suggest that the Board believed it could examine into the reasonableness of the positions taken by Wards in the course of bargaining. Even if it be denied that the Board's assumption of such managerial authority was certain or indisputable, the passages quoted must at least leave this Court unsatisfied as to the results of the inquiry it must make whether the Board applied the proper statutory standards. But:

“If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process.”

U. S. v. Carolina Freight Carriers Corp., (Mar., 1942) U. S., at p.; 62 S. Ct. 722, at p. 730; 86 L. Ed. 622.

If the Brief which the Board has filed in this case fairly states the view of the Board itself, doubt ripens into certainty, since the Brief relies heavily (see pp. 24, 26, 29, and 34) on what it terms “respondent's refusal to agree to concededly reasonable proposals” (Footnote 6). Obviously the argument presupposes that if an employer does not agree to proposals which the Board considers reasonable he acts in bad faith.

Under the guise of determining the question whether Wards bargained collectively, the Board actually passed judgment on the terms which Wards should have offered or accepted while bargaining. This the Board had no power to do.

6. The phrase, often repeated in the Brief, is intelligently dishonest, since Wards has not “conceded” the reasonableness of the demands, and would be ready to defend the reasonableness of its own position were it an issue (See Proposition VIII of this brief).

This is not the first time that an administrative agency has sought to disguise the usurpation of one power as the exercise of another and proper one; but the courts have always been alert to the danger:

“No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption.”

Waite v. Macy, (1918) 246 U. S. 606, at p. 608, 38 S. Ct. 395, at p. 396; 62 L. Ed. 892.

If the Supreme Court felt called upon in the *Waite* case to exercise its power of review to prevent the usurpation of the power to exclude colored tea—a matter of small social import,—this Court should not hesitate to act similarly when the power sought to be acquired is one of writing the terms of the labor contracts for every employer subject to the Act.

IV.

The Board Rested Heavily Upon Findings Which Are Clearly Improper.

The Board in its “concluding findings” on the subject of collective bargaining stated “that the respondent failed in a number of respects to comply with its obligation to bargain” (R. 58). These several respects, nine in number, were then set forth (R. 58-67). The Board, after reciting them, said: “Reviewing the whole congeries of events, we find that the respondent did not, as it was bound to do, ‘confer and negotiate sincerely with the representatives of its employees’ ” (R. 68).

Obviously, then, these nine “respects” set forth in its “concluding findings” on the question of collective bargaining were, all of them, findings on which the Board “rested heavily.”

Among these findings were embedded the various misconceptions of the law which have been enumerated under propositions II and III of this brief. Since these errors of law were intermixed with the findings on which the Board "rested heavily," the case should be remanded if Wards is right as to a single one of these claimed errors of law, under the doctrine of *NLRB v. Virginia Electric & Power Co.*, (1941) 314 U. S. 469; 62 S. Ct. 344; 86 L. Ed. 306, and the other cases cited under Proposition I.

The Board also "rested heavily" upon other findings which are either completely unsupported by evidence or clearly improper for other reasons. The findings are so conspicuously erroneous as to demonstrate the need for remand even without proof that the ultimate conclusion totally lacks substantial support.

- A. The Board rested heavily upon a finding that a breach of instructions on the part of a supervisor having no part in the collective bargaining negotiations "reflects on Wards' good faith in the collective bargaining negotiations".**

The Board said:

"Finally, the respondent, as noted below, solicited the individual striking employees to return to work in violation of Section 8(1) of the Act. * * * Such conduct reflects on its good faith in the collective bargaining negotiations" (R. 67).

Perhaps by deliberate intent, the Board failed to state whether it meant that the "solicitations" which reflected on Wards' good faith were the innocuous telephone calls made the day after the strike which have already been discussed, or the supposed activities of supervisor McGowan. This very ambiguity amounts to a lack of the

“basic findings” necessary to a correct understanding of the Board’s theory, and in itself is enough to require reversal. (Proposition I, Section D.)

If the Board meant to refer to the telephone calls only, the fact, as already discussed, that they were within Wards’ legal rights makes the inference of bad faith untenable. But if the Board meant to refer to all of the conduct which it treated as amounting to solicitation, including McGowan’s activities, the Board drew an inference which is logically without support in the record for other and equally cogent reasons.

The Board itself found that, in doing more than telephoning the standard message to the employees, McGowan “went beyond” (R. 70) the instructions given him, which forbade any insistence on a return to work, or any threats, or any discussion with employees whatsoever (R. 69-70).

Wards’ bargaining representatives neither participated in nor knew of McGowan’s supposed improper activities. Even if Wards is to be held responsible for McGowan’s actions in derogation of his instructions—a disobedience not known to Wards’ management—this ascription in no manner whatsoever permits an inference as to lack of good faith on the part of the representatives of Wards’ management in the bargaining negotiations in which McGowan did not participate.

The drawing of such an inference reflects instead on the good faith of the Board’s findings.

B. The Board rested heavily upon findings which included absolute misstatements of the record.

The Board's "concluding findings" on the question of collective bargaining include certain clear misstatements of fact. Without repeating at length the discussion in Wards' brief as Petitioner, the following list shows that the Board clearly disregarded the record in making its findings:

1. "The respondent has offered no explanation for its refusal to submit * * * written countersuggestions" (R. 65).

The reasons for Wards' position were fully explained to the Unions in the bargaining sessions and were in evidence before the Board in the correspondence between Powell and Barr (See Wards' Brief as Petitioner, pp. 54-56). Perhaps the Board was not satisfied with Wards' reasons; but to say that Wards "offered no explanation" is an absolute untruth.

2. Wards "in thus relying simply on existing practice as a reason for not agreeing to minor proposals, failed to fulfill its obligation" (R. 66).

Wards did not simply rely on existing practices as the reasons for its insistence on the *status quo*; it advanced its reasons to justify existing practices on each point and discussed them fully. (The references to the undisputed evidence are collected on p. 52 of Wards' Brief as Petitioner.)

3. "Nevertheless, the respondent objected to taking the initiative in the bargaining process; that is, objected to formulating proposed conditions of employment affirmatively, as counter-proposals to union demands" (R. 63).

Wards refused to submit a formal written counter-proposal, but it "affirmatively" participated in the formulation of acceptable terms in modification of union demands.

Without repeating the passages from the Board's own findings which show Wards' active participation (See Proposition II of Wards' Brief as Petitioner), a brief description of one part of the Board's own evidence will remove the issue from the field of possible debate.

Board's exhibits 10 (R. 531) and 12 (R. 556) are copies of proposed contracts on which the union representatives recorded several changes in wording proposed by Wards. Exhibit 10 shows, as to the sections annotated by the unions, the following changes of wording suggested by Wards:

Section 4—"Thanksgiving" to be substituted for "Armistice Day."

Section 13—Marked "OK—changed" by substitution of "6" for "5."

Section 31—(Wages) marked "no increase." (The wage scale acceptable to Wards had previously been furnished—R. 40.)

In addition, Sections 15, 17, 19, and 28 are marked "OK," showing Wards' expression of agreement. Exhibit 12 shows the following changes in wording suggested by Wards:

Preface—"use language of certification."

Article 1—Conversion of recognition into a statement of fact rather than a promise.

Article 3—Eight words stricken out of Section 1; Section 2 stricken out entirely; and five words stricken out of Section 3.

Article 4—A note in the margin reads: “co. not in position to grant increases—Powell.” The last sentence is stricken, and a verbal change on the next to the last sentence is shown.

Article 7—Certain words are cut out.

Article 12—Several words are added to the clause as written.

Furthermore, Articles 6, 8, and 9 are stricken, and Article 13 is noted “*out* by Estabrook.”

These two Board Exhibits conclusively show that Wards affirmatively assisted in formulating acceptable terms. This fact is shown so clearly that we need not refer to the many other items of undisputed evidence to the same effect.

The Board's repeated assertions that Wards refused to make any “affirmative efforts” to reach an agreement display a complete disregard for the truth.

Other unfounded assertions in the Board's “concluding findings” are noted in Wards' Brief as Petitioner (see pp. 58-59) and are discussed incidentally under Proposition VIII of this brief. Enough has been said, however, to demonstrate that the Board's findings are “permeated” with misstatements of fact and completely unfounded assertions. The Board cannot deny that it was influenced in its final conclusions by these unfounded and unsupported criticisms of Wards' conduct. To permit an order to stand when based on findings tainted by such errors would be inequitable and an invitation to further abuses on the part of the Board.

C. The Board rested heavily on an inference drawn from matters which were not in evidence before it.

The essence of that procedural due process which must be observed by this Board just as much as by other administrative agencies is a fair trial. A fair trial implies notice of the evidence on which the decision is to be based: *Railroad Com'n v. Pac. Gas & Elec. Co.*, 302 U. S. 388, at pp. 392-393, 58 S. Ct. 334, at pp. 337-338; 82 L. Ed. 319. That principle prohibits an administrative agency from considering matters not introduced as evidence: *I. C. C. v. L. & N. R. Co.*, 227 U. S. 88, at p 93; 33 S. Ct. 185, at pp. 187-188; 57 L. Ed. 431; *U. S. v. Abilene & S. Ry. Co.*, 265 U. S. 274 at 288; 44 S. Ct. 565 at p. 569; 68 L. Ed. 1016.

The Board in its "concluding findings" on collective bargaining stated that "the respondent's declarations abundantly disclose an attitude inconsistent with its obligation" (R. 62). Among the three "declarations" is a sentence lifted from the brief which Wards filed with the Board attempting a definition of the minimum requirements of the duty to bargain (R. 63).

The brief was not in evidence, nor was any notice given Wards that arguments of its counsel as to the minimum requirements of the Act would be the basis of an inference that Wards in prior negotiations had done no more or intended to do no more than observe such minimal requirements. Such an inference is completely untenable; the situation would be the same as if the Board had concluded that Wards offered no concessions to the Unions simply because Wards contends that it was under no duty to do so.

The lack of logic in the Board's inference emphasizes the complete absence of fairness in the Board's consid-

eration of a legal argument as the basis for reaching a factual conclusion. Under such a practice, an employer would advance an argument of law on peril that the Board, if it did not agree, would deduce facts about the employer's state of mind merely from the making of an argument. This procedure is a complete denial of due process.

- D. The Board rested heavily upon unsupported inferences drawn from irrelevant evidence as to the interpretations of the law held by Wards' representatives, and the Board furthermore erroneously concluded that the mere holding of a view of the law which disagreed with the views of the Board amounted in itself to a violation of the Act.**

The Board's reference to the brief filed with it by Wards' counsel was only one of several instances where the Board inferred that, because Wards expressed a different view from that held by the Board as to the extent of the duties imposed upon it by the Act, Wards evidenced a refusal to bargain. The Board's extensive discussion of Wards' view of the law shows how much the Board was influenced by its disagreement with Wards' opinion as to the proper interpretation of the Act.

- 1. The interpretations of the law which the Board disliked were proper.**

The Board's concluding findings discuss at length four expressions of opinion as to the nature of the duty to bargain. The Board's misconception of the law is emphasized by the fact that it chose to criticize statements which were entirely defensible.

- a. "As Barr, speaking for the respondent, told its agent, Powell: '* * *. it is the Union, not the Company, which is seeking an agreement.'"

Barr's opinion was that the duty imposed by the Act upon an employer is only to negotiate union demands, and not to seek a union agreement. This view of the law is supported by quite respectable authority:

"However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining."

NLRB v. Columbian Enameling & Stamping Co., (1939), 306 U. S. 292, at p. 297, 59 S. Ct. 501 at p. 504, 83 L. Ed. 660.

- b. "Accordingly, Powell told the Unions at the December 13 conference that 'his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company'." (R. 62)

Powell thus interpreted the Act as imposing no "affirmative duty" on the employer. Whether or not this is true is an argument over a label and not an argument over a matter of substance. As Mr. Justice Frankfurter has commented in another connection:

"'Negative' and 'affirmative' in the context of these problems, is as unilluminating and mischief-making a distinction as the out-moded line between 'nonfeasance' and 'misfeasance'."

Rochester Tel. Corp. v. U. S., (1939), 307 U. S. 125, at pp. 141-142; 59 S. Ct. 754, at pp. 762-763, 83 L. Ed. 1147.

Realistically, no one can deny that bargaining usually begins with union demands, and that the unions have the burden of convincing the employer that these demands should be acceptable.

- c. "Similarly, the respondent in its brief states that 'the duty to bargain is no more * * * than the duty to meet the employee representative and do * * * or say nothing which would make a binding trade agreement impossible of attainment'." (R. 62-63)

Stated conversely, the duty to bargain is no more nor less than the duty to recognize the authority of the union, to discuss union demands sufficiently to avoid mutual misunderstanding, and to make binding and written agreements on such terms, if any, as are mutually acceptable. Any conduct less than this would be the doing or saying of something "which would make a binding trade agreement impossible of attainment".

All of the authorities cited under Proposition I of Wards' Brief as Petitioner uphold the propriety of the opinion thus expressed in Wards' brief to the Board.

- d. "That the respondent was opposed to affirmative efforts on its part to find a basis for agreement by means of counterproposals appears also from Barr's statements that the respondent had at no time sought a contract with a union and that

Therefore, by the very nature of the situation, the initiative lies with the union. We propose to fill our obligations to bargain with the Unions in good faith, but this does not pass to us 'the burden of going forward'. The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our rela-

tive economic positions of such nature as to induce us to seek some concession from the union. * * *

As Mr. Ball stated, we do not think that the Act places upon an employer the absolute duty to make counterproposals. * * * '' (R. 63-64)

Such is Barr's analysis, in his advice to Powell, of the extent of the duty to bargain. The Board's apparent criticism is that Barr believes that under the Act "the initiative lies with the union" (R. 64) and that the union is the party which has "the burden of going forward". Again Barr's opinion has judicial sanction:

"The employer is not required to take the initiative in seeking a contract with his employees or with their chosen representatives."

Wilson & Co. v. NLRB, (8th cir.), 115 Fed. (2d) 759, at p. 764

2. Proof that Wards' representatives may have held a wrong view of the meaning of the Act does not support an inference that what they did violated the Act as properly interpreted.

Even if we assume for the sake of argument that the interpretation of the Act held by Wards' representatives was wrong, still the holding of a wrong view of the meaning of a law did not make Wards a law-breaker.

Obviously, a man may believe that he is under no legal duty to act, but still may act. If, as it was held in *F. W. Poe Mfg. Co. v. NLRB*, (4th cir.), 119 Fed. (2d) 45, at p. 48, an intent to violate the Act does not constitute a violation unless acted upon, *a fortiori* a misconception of the scope of the legal duties does not constitute a violation of the Act unless it results in a refusal to do as much as the Act really commands.

The undisputed evidence shows that Wards did more in the negotiations than it felt it was absolutely bound to do under the Act. We have already shown that Wards did in fact "actively cooperate" with the unions in an attempt at "formulating proposed conditions of employment affirmatively". To take another example, Wards' representatives believed that the Act did not require Wards to make concessions; nevertheless Wards did in fact offer concessions, as the Board itself grudgingly admitted.

The undisputed evidence that Wards consistently did more than it believed itself bound to do makes completely untenable any inference that Wards' negotiators did or intended to do no more than the minimum required by its own view of the law. Thus, since Wards did in fact make concessions, any argument that Wards' negotiators did not make or did not intend to make concessions is absurd.

The fact is that negotiators may conduct bargaining sessions under a mistaken belief that they are legally bound to do nothing, and still bargain collectively. If the Board were correct, no collective bargaining ever took place before the Act was passed, since no employer believed himself to be legally bound to bargain.

For these reasons the interpretation of the Act which Wards' negotiators held is completely irrelevant to the question whether Wards bargained, since Wards' view of the law cannot support any relevant inference.

3. The Board actually held that a belief in an erroneous interpretation of the Act amounted in itself to a violation of the Act.

The Board did not in fact expressly claim to draw any inference from the views of the law held by Wards. Actually, the Board concluded that the mere holding of such views amounted to a violation of the Act!

The first three statements quoted above are the three "declarations" which the Board prefaces with this statement:

"The respondent's declarations abundantly disclose an attitude inconsistent with its obligation actively to cooperate with the Unions and to endeavor to reach understandings with them." (R. 62)

The quotation of these three "declarations" is then followed by the assertion that:

"The Board and the court decisions hereinabove cited clearly established that the respondent by its negative attitude was refusing to bargain collectively in good faith." (R. 63)

The effect of these two statements is that the holding of a view of the law with which the Board disagreed constituted an "attitude" by which Wards "was refusing to bargain collectively".

Three out of the four expressions of opinion were never repeated to the Unions. Obviously, it was not the making of the statements which the Board held to be a violation of the law, but the holding of the interpretations.

In the absence of evidence that Wards took some action in violation of the law, and in the absence of evidence that Wards intended to do no more than it believed itself bound to do legally, the Board's belief that Wards' view of the law constituted an illegal "attitude" is so patently absurd as to demonstrate the prejudiced and arbitrary character of the Board's fact finding process.

E. The Board seeks to support its conclusion that Wards failed to bargain by drawing an inference from Wards' supposed violation of Section 8 (1) of the Act, while basing its conclusion that Section 8 (1) was violated in part upon an inference drawn from Wards' supposed failure to bargain.

The Board's decision contains a classic example of argument in a circle. Discussing Wards' supposed "solicitation" of its employees, the Board said:

"Further, as we have found above, the strike was caused by the respondent's unlawful refusal to bargain collectively. Under these circumstances, and upon the entire record, we find that the respondent, by communicating with the employees directly through its supervisory employees * * * was seeking to induce the striking employees to desert the Unions. * * *" (R. 74)

The Board thus "rested heavily" upon its previous conclusions that Wards had refused to bargain and that this refusal caused the strike when it held that the telephone calls to Wards' employees amounted to a violation of Section 8 (1) of the Act.

But the Board had based its conclusion that Wards had failed to bargain collectively partly on an inference of bad faith drawn from the supposed "solicitation":

"Finally, the respondent, as noted below, solicited the individual striking employees to return to work * * * Such conduct reflects on its good faith in the collective bargaining negotiations." (R. 67)

This lack of logic vitiates both conclusions.

Enough had been said to show that the Board weighed the evidence in the present case not only under a misconception of the scope of the duty imposed by the Act and of the powers conferred upon the Board, but under a biased and unsupported view of the facts. The Board

was influenced in its decision by improper considerations; the Board drew untenable inferences; and the Board disregarded the fundamental principles of fair play. This Court surely cannot blind its eyes to the injustice which an affirmance of this order would constitute.

V.

The Board's Brief Evidences Bias and Prejudice In Its Attempt to Argue in Support of the Board's Order By Reference to Matters Which Were Not Before the Board and Which Represent a Previous and Demonstrably Unfair Action Against Wards By the Board.

If a brief were proper evidence of the mental processes of the party on whose behalf it is filed, then the Board's brief in the present case would demonstrate that the Board reached its conclusions after considering matters which were not in evidence before it, and which, because of their history, would never have been considered unless the Board were biased and completely unfair.

Because, unlike the Board, we do not assume that a brief prepared by counsel necessarily represents the thinking of the client, we make no such argument; but the attempt of the Board's counsel to create prejudice by the brief they have prepared is so flagrant that we would do this Court a disservice by remaining silent.

- A. The Board's brief argues as if the Board considered its conclusions of fact in a previous proceeding against Wards in reaching its conclusions in the present case, although no record of such prior proceeding was introduced in evidence in the present case.**

On page 6 of the Board's brief a footnote refers to "an earlier decision involving the mail order house and retail store here involved, 9 NLRB 538." The note then quotes

certain evidence introduced in the former case as to events occurring in 1936, and adds:

“Powell’s stand at the September 19 conference makes it clear that respondent’s ‘long-established policy’ in 1936 was still in effect in 1940, though it plainly violated the Act.”

The Board thus argues to this Court that its order should be sustained because certain evidence offered at a hearing several years earlier justified the Board in drawing inferences from the evidence actually introduced in the present proceeding. This argument necessarily presupposes that the Board did consider the evidence introduced at the previous hearing in drawing its inferences in the present proceeding. If this be a fact, the Board has denied Wards due process. If this is not the fact, the argument by Board’s counsel is unwarranted and unprofessional.

Wards was never given any notice that evidence introduced at the prior hearing was to be considered by the Board in the present hearing. Wards was never given any opportunity to rebut either the evidence so considered or the inferences which Board’s counsel claim that the Board drew from this evidence.

Board’s counsel refer to the prior hearing elsewhere in the Board’s brief. On page 27, Board’s counsel argue, with respect to Wards’ refusal to agree to an anti-discrimination clause:

“The employees’ experience when they first attempted to organize and exercise their rights under the Act in December, 1936, gave them ample reason to believe that the law alone was not complete protection against discrimination at respondent’s hands.”

To this statement, a footnote is appended, stating that the Board found that Wards was guilty of “discharging

23 employees because of their union membership and activities.”

This argument is made in a section of the Board’s brief entitled “Respondent’s refusal to agree to concededly reasonable proposals.” Board’s counsel thus argues that the facts of the previous case provided the reason why Wards’ position was, in the eyes of the Board, “unreasonable.”

If the Board’s decision was in any part based upon the circumstances supposedly disclosed by the previous hearing, but which were not introduced in evidence in the present case, Wards was denied procedural due process, and the Order must be set aside. This would not be the first time Wards has been accorded such treatment by the Board: *Montgomery Ward & Co. v. NLRB* (8th cir.), 103 Fed. (2d) 147.

B. The reference by Board’s counsel to the earlier proceeding is doubly inexcusable in view of the fact that a Congressional investigation has shown that the earlier proceedings were not prosecuted by the Board in good faith.

The earlier proceeding involving the Portland mail order house and store was decided by the Seventh Circuit Court of Appeals on December 8, 1939: 107 Fed. (2d) 555.

On December 30, 1940, (Cong. Rec. Vol. 86, Part 12, p. 14011) a special committee of the House of Representatives (the so-called “Smith Committee”) reported on its investigation of the National Labor Relations Board pursuant to House Resolution 258, Seventy-Sixth Congress, First Session. The following excerpt from this

Report shows the real character of the charge of discrimination which the Board made against Wards:

“The attitude of another regional attorney who deliberately misrepresented the strength of the Board’s case to the secretary of the Montgomery Ward Company of Chicago, Illinois, in a letter dated January 19, 1939, is again another example of the lengths to which some of these Board attorneys went in order to bend employers to their will. In a very lengthy letter he reviews the Board’s decision and states that elsewhere in the record is a great deal of evidence supporting an 8 (3) finding. He closes his communication by stating ‘* * * I feel that a careful examination of the record as made will allow you to advise your principals that a great deal of doubt exists as to your ability to prevail in the circuit court in this matter.’

“While Mr. Babe’s arguments appear persuasive on the face of the letter, the truth of the matter is to be found on a memorandum attached to a copy of the letter as found in the files of the Seattle regional office to which Babe was attached. This memorandum reads:

Dear E. J.: [Eagan, regional director] This is mainly hooey, as the 8 (3) proof is so highly equivocal as to be suffering from galloping anaemia. [sic]

Regards,
John.”

The Committee report was not made public until a year after the Circuit Court decree had been entered; and Wards had no opportunity to reopen the case.

Now the Board’s counsel argues to this Court that the Board’s findings in the present case should go unchallenged because they are supported by the assumed truth of charges of discrimination made in another case, which the Board continued to prosecute after its repre-

sentatives had ceased to believe in the truth of the charges. The Board's arguments to this Court evidence prejudice, a lack of good faith, and a complete disregard of justice and fair play.

VI.

If This Court Agrees With Any One of the Contentions So Far Advanced in This Brief, the Case Should be Remanded Since a Material Error Has Been Committed.

So far, this brief has dealt with errors of law which call for a remand so that the Board may reappraise the evidence under a correct view of the law and facts, even though the record may have contained some evidence which would support the Board's conclusions. The sufficiency of these errors to require a remand thus does not depend upon Wards' ability to convince this Court that no substantial evidence whatsoever of an unfair labor practice appears in the record. This Court does not even have to agree with every one of the contentions advanced so far in this brief before ordering a remand. All of the several points discussed raise questions of law which were material to the Board's ultimate decision; if Wards' contentions as to any one of them be upheld, the Board committed a material error.

If a trial court improperly instructs a jury as to the nature of the offense sought to be proved, material error is committed; when the findings of an administrative agency do not clearly disclose that the nature of the offense has been correctly conceived by the agency, the doubt raised is on a material point, and, on the principle of the cases cited under Proposition I, the case must be remanded. So too, when the agency has "rested heavily" upon findings which have "inadequate" support, the error is a material one definitely affecting the final result.

The errors which have been discussed involve either a misconception of the nature of the offense charged, or are errors of fact stated in the Board's "concluding findings" as distinct from the Board's narrative recitation of the history of the case. They are thus material errors, any one of which calls for a remand of the case.

VII.

In Addition to the Errors of Law Already Discussed, the Utter Absence of Any Substantial Evidence of a Failure to Bargain Demands That the Board's Decision and Order Be Set Aside and Denied Enforcement.

Ward's Brief as Petitioner acted on the assumption that the Board's ultimate conclusion as to Wards' supposed failure to bargain rested directly on the so-called "concluding findings" of the Board. These "findings" were then fully analyzed to show that not a single one was based on factual proof substantially supporting them (Wards' Brief as Petitioner, pp. 41-63).

Propositions II through VI advanced in this brief show that the Board committed many grave errors of law in reaching its decision. As a result of these errors, many of the "concluding findings" upon which the Board based its conclusions do not as a matter of law or logic support those conclusions. In fact, of the nine "respects" in which the Board charged that Wards failed to bargain, the errors already discussed dispose of seven. We now propose to show that the two remaining findings equally lack support in the record, without repeating the lengthy analysis set forth in Proposition III of Wards' Brief as Petitioner.

A. The reference in the Board's brief to the prior charges at Portland shows how justified Wards was in rejecting the proposed clause against anti-union discrimination.

The previous proceeding at Portland charged Wards with wrongfully discharging fifty-one employees (9 NLRB 538 at p. 540). The Board upheld these charges as to twenty-three employees, and the Circuit Court found just enough evidence to support an inference as to twenty-one. (*Montgomery Ward & Co. v. NLRB*, (7th cir.), 107 Fed. (2d) 555).

The revelations of the Smith Committee show why Wards may well have thought the charges unfounded even though sustained in part by the Circuit Court of Appeals.

Not a single item of evidence in the present case suggests that Wards had discriminated against any employees because of union activity. Nevertheless, in accordance with customary union tactics, vague, unproved and unfair charges to this effect had been made in the union publication, the American Labor Citizen (Wards' Ex. 2, R. pp. 226-230, at pp. 228 and 229).

For Wards to acquiesce in the union demand that Wards promise not to discriminate would in the eyes of many employees imply a confession of guilt and an admission of the truth of the utterly unfounded union charges. To charge a man with the commission of a crime, and then to request him to promise not to commit such a crime in the future is to ask him to condemn himself.

The Unions' request was made for an obviously false reason: "a lot of the Union members did not know of a similar provision in the Wagner Act" (R. 765). The absurdity of the asserted reason is emphasized by the fact that Wards had been compelled to post a cease and desist

notice as a result of the decree of the Circuit Court of Appeals entered less than a year earlier.

Wards had the right to reject with indignation the Union request that it promise not to discriminate. Yet this refusal is one of the reasons most emphasized by the Board as justifying its holding that Wards failed to bargain.

B. If the Board was entitled, as its counsel argue, to refer to other proceedings involving Wards, the Board would have had conclusive evidence that Wards had no policy against signing labor contracts.

The Board's brief refers (p. 6, footnote 6) to evidence in the previous proceeding that Wards had a "long established policy to enter into no business agreement with any outside organization". Board's counsel argue that Powell's statements during the Portland negotiations "make it clear that respondent's 'long-established policy' in 1936 was still in effect in 1940".

The complete absence of fairness in this argument is demonstrated by the fact that the Board itself has found exactly to the contrary in a third proceeding involving Wards.

In a decision and order dated February 26, 1942, (39 NLRB No. 41) the Board found that:

"The respondent at its Schwinn Warehouse, Chicago, Illinois, has not engaged in unfair labor practices within the meaning of Section 8 (1) or 8 (5) of the Act."

The Board had reviewed bargaining sessions conducted at Chicago on behalf of Wards by Barr, the same man who was found by the Board in the present case to be "the respondent's official in charge of labor relations and collective bargaining for all the stores and mail order houses" (R. 34). These negotiations were carried on at the same time as those involving Portland.

The Board found as follows with respect to a bargaining session held October 3, 1940:

“During the course of the discussion, Wolchok asked Barr ‘whether or not the company would sign a contract with the union and enter into a contract with the union’. Barr replied: ‘We will sign anything on which we will agree * * * On any of these questions which * * * we are in agreement on we are prepared to enter into a contract with the Union.’”

Acting under Barr’s instructions in the present case, Powell told the Unions that Wards “‘possibly’ might sign a contract” (R. 59), but did not promise that a contract would be signed as the question was premature before “we could reach an agreement upon substantial provisions” (R. 59). No inference of an intention never to sign an agreement could possibly be drawn from this statement of Powell’s, especially when read in the light of Barr’s promise to sign in contemporary negotiations where agreement had in fact been reached on substantial points.

The Board’s decision omits to report, and the Board’s brief neglects to inform this Court that Wards published a newspaper notice in Portland stating its willingness to sign a contract whenever agreement was reached (Wards’ Ex. 11, R. 651).

When counsel for the Board call the attention of this Court to the facts of a proceeding relating to events four years prior to the ones in issue, but fail to call the attention of this Court to the facts of another proceeding covering contemporaneous events, and to other facts appearing in the present record, counsel have been unfair both to Wards and to this Court.

VIII.

The Board's Brief Demonstrates the Weakness of the Board's Case by Completely Misstating the Facts, And, in Its Effort to Justify the Board's Findings, by Relying Upon Supposed Facts Which the Board Itself Did Not Find.

Procedural due process requires that an administrative agency make known through some species of findings the basic facts upon which its conclusions are based. The form of such findings is not material; but, formally or informally, in numbered paragraphs or in narrative form or in some manner, the findings must be made.

The conclusions of the administrative agency must be supported by these findings. An absence of such findings cannot be supplied by counsel in the course of argument. Nor can counsel properly justify an order by arguing that it is supported by facts which the agency might have found, but did not.

The following list of the statements of purported facts to be found in the Board's brief but which the Board did not mention in its findings or which are demonstrably untrue will show that Board's counsel had great difficulty in supporting the Board's conclusions by an analysis limited to the facts found by the Board or evidenced in the record.

1. "Powell * * * refused even to agree to those demands which involved the making of no concession to the Unions, such as the recognition and no-discrimination clause." (Board's brief, p. 21)

To the extent that this implies that Powell refused to agree to other demands involving no concession, it is a clear untruth. The record does not show a single other

instance where Wards refused to agree to a demand embodying only the *status quo*. We need not here repeat the reasons for Wards' position as to recognition and discrimination.

2. "Respondent's * * * refusal to bind itself to recognize the Unions and its refusal to agree to other concededly reasonable proposals * * * fully warranted the Board in its finding." (Board's brief, p. 24)
3. "Respondent's refusal to agree to concededly reasonable proposals". (Board's brief, p. 26)
4. "In view of respondent's * * * failure to agree to concededly reasonable proposals * * *." (Board's brief, p. 34)

Wards strenuously denies that it refused to agree to any "concededly reasonable" demand. Wards does not concede that any Union demand which it refused was reasonable, especially the demand that it promise rather than recite recognition, and the demand that it promise not to discriminate.

These passages show that Board's counsel reflect the Board's belief that it had the right to pass on the reasonableness of terms on which Wards insisted.

5. "Barr gave express, written orders to his negotiator, Powell, not to * * * 'agree' to matters even though there was no dispute as to them." (Board's brief, p. 32)

This is a typical half-truth that gives an impression exactly the opposite of the truth. Barr instructed Powell:

"In discussing individual clauses, state that you have no present objection to clauses which are not objectionable, but do not 'agree' to such clauses. You can only agree to a contract as a whole." (R. 735)

The statement in the Board's brief reads as if Powell had been instructed not to enter into a contract even on acceptable terms. The fact is that Powell was told that he could contract, but should not do it piecemeal. The statement in the Board's brief thus completely misrepresents the evidence.

6. "Powell was then asked if respondent would be willing to sign an agreement which merely set out its present policies and practices. He replied, so the union representatives uniformly testified, 'No'." (Board's brief, pp. 19-20)
7. "Nor would respondent even agree to enter into an agreement providing simply for the continuation of the existing hours and conditions of employment." (Board's brief, p. 31)
8. "Further, in refusing to embody the existing terms and conditions of employment in a binding agreement when the Unions asked whether it would do so, respondent undeniably established its lack of good faith." (Board's brief, p. 33)
9. "If the employer finds himself unpersuaded * * * the very least he must do, when request is made, is to offer to enter into an agreement providing for the maintenance of the status quo. Respondent was not even willing to do this." (Board's brief, p. 33)
10. "In view of respondent's * * * failure * * * even to agree to a contract providing for the continuation of existing terms and conditions of employment * * *." (Board's brief, p. 34)

These statements are absolutely contrary to the facts and to the Board's own findings.

The Board's brief gives two record citations to the assertion that Powell "replied, so the union representatives uniformly testified, 'No'." These citations, R. 175

and 452, are to the testimony of Board's witnesses Estabrook and Allen. Estabrook testified (R. 175) that either witness Langford or witness Allen asked Powell "Will you sign an agreement * * * with the same wages, hours, and working conditions as of the day before the strike" and that Powell answered in the negative. Allen later testified (R. 452) that he was the one who asked the question. On cross-examination he admitted that, when Powell "inquired if we were submitting that as a proposal", he either answered or would have answered that the unions were not doing so (R. 457). He did not deny that Powell had answered his question simply by saying that "the form of the agreement should be postponed until after the contents of the agreement had been decided upon" (R. 456).

The Board itself credited Powell with saying:

"I replied that the question of the form of agreement, that is, whether it should be verbal or written, is premature at this time." (R. 51)

The true facts are:

first, that the unions never offered to contract on the basis of the *status quo*; (R. 247)

second, that the question was a hypothetical one asked for purposes of entrapment after the unions had filed charges that Wards had failed to bargain (R. 274-277);

third, that Wards did not refuse any request, bona fide or otherwise, to sign a contract on the basis of the *status quo*; and

fourth, that Wards simply answered a hypothetical question by the comment that it was "premature". (R. 51-52)

Counsel have not been helpful to this Court in representing as fact an interpretation of the evidence which the Board itself rejected.

11. "Receding from their principal demands, that is, for a union shop, a seniority rule, and an arbitration clause, the Unions asked respondent literally to write its own contracts with them, but to no avail."
(Board's brief, p. 36)

This carries the previous misstatements to a new high. The Board itself found that at the end of the last conference

"Ashe stated that the clauses of the contracts to which the respondent objected primarily were those providing for any union shop, any increase in wages, a seniority rule, or any form of arbitration, and stated further: 'We aren't getting any place; we might as well call it quits'." (R. 54)

How absurd this comment would have been if the Unions had in fact receded from their principal demands.

12. "Powell * * * stated that it would serve no useful purpose for respondent to do so unless respondent could be assured that the terms would be agreeable to the Union — in other words, that the Company proposals would not be subject to any negotiations."
(Board's brief, p. 11)

The Board did not find, and the record does not disclose any statement that the terms offered by Wards would not be subject to negotiation. The insistence of Powell was simply that so far as possible the negotiations precede rather than follow the formal reduction of terms to a written proposal.

13. "Respondent's * * * insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining * * * " (Board's brief, p. 24)
14. "Respondent's insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining" (Board's brief, p. 29)
15. "In view of respondent's * * * insistence upon determining unilaterally matters which are legitimate subjects of collection [sic] bargaining * * * " (Board's brief, pp. 34-35)

No record reference is given for the first and third statements, but the second appears as a section heading. Under it, the brief discusses Powell's rejection of union demands for concessions as inconsistent with "company policy", which, the Board's brief adds, "was a fixed and inflexible matter and not to be bargained about" (Board's brief, p. 29). The assertion that Wards' policy was "not to be bargained about" is palpably untrue in view of the undisputed fact that Wards fully discussed its practice and policy in the course of negotiations and even offered to modify it by certain concessions. The assertion is the false conclusion of Board's counsel, and does not appear in the Board's findings.

The section also quotes two statements by Powell which are not referred to in the Board's findings. The first was that "the ultimate decision in matters affecting the hiring and discharge of employees and matters generally affecting the operation of the business should remain in the management of the company" (R. 829). This statement was proper, and shows that Wards did not only explain its policy but also explained the reasons for it. Wards had the legal right to determine unilaterally the terms of employment on which it would insist, so long as it did not refuse to bind itself to the establishment of such

terms. No provision of the law compels an employer to contract away the rights to decide whom he will hire or discharge, so long as he otherwise obeys the law. If Powell's statement be legally incorrect, then an employer has been deprived of the right to refuse to grant a closed shop.

Powell's supposed other statement that Wards "were the ones to decide whether the employees should have more money" (R. 373) was ascribed to him by a union witness, Dixon (Footnote 7). If made, the statement was proper, since it was simply the preface to a denial of a wage increase (R. 374). An employer has the legal right to decide what wages he will pay; and the assertion of this right is in no way inconsistent with the duty to incorporate such wages if mutually agreeable in a labor contract.

The Board did not find, nor does the record support, any conclusion that Wards insisted upon the retention of freedom of unilateral action on any "legitimate subject of collective bargaining". Board's counsel are here offering a new but equally insubstantial theory to support a conclusion which the Board drew under a different theory.

16. "Powell again rejected the Union's demand for additional compensation for working supervisors upon the admittedly false ground that they did not employ such persons." (Board's brief, p. 22)

Ward certainly does not "admit" that Powell rejected any demand on a "false ground". The demand was for extra compensation for "a working foreman, forelady, supervisor, or instructor" (R. 557). Powell, according to Estabrook's testimony as to the November 12 meeting, "didn't like the idea of having in there some of the clas-

7. The Board made no finding as to the truth of Dixon's testimony. Dixon was generally a confusing, inaccurate, and unconvincing witness. Here, again, Board's counsel has felt free to assert as facts debatable testimony as to which the Board itself made no finding.

sifications that we put in there", and stated that Wards "didn't classify its employees as such" (R. 252). The Board admits that Powell then offered a 3 cents an hour differential for working supervisors (R. 54). Powell reported to Barr that Wards did have "working supervisors" on its payroll (R. 739, 54); but the record does not show that Wards employed foremen, foreladies, or instructors. On December 17, Powell rejected this clause for the following reasons:

"We objected to Article 6 on the ground we did not believe we employed persons such as those mentioned. Also, we inquired whether the second sentence of Article 1 did not eliminate such persons from the jurisdiction of the Union. Also, we stated we could not grant any concessions in the rate of pay of these people." (R. 764, 765)

Of Powell's three reasons for rejecting the union demand, the first had reference to the undisputed fact that Wards did not employ all the "persons such as those mentioned". Powell, having admitted the employment of supervisors on November 12, would not have been so foolish as to deny their existence a month later. Powell's point was not misunderstood; the Board's witnesses do not mention the supposed discrepancy between Powell's position on November 12 and that taken on December 17. Both the Board (R. 67) and the Board's brief misrepresent the facts.

17. "Although the Unions insisted upon receiving a prompt answer, * * * Powell put them off, agreeing to give them an answer in three days (R. 289). Thereupon the union representatives expressed the view that they 'were being stalled' (R. 161-162)." (Board's brief, p. 13)

The unions expressed the factitious opinion that they were "being stalled" at the beginning of the November 25 meeting, and not as a result of Powell's three-day delay for confirmation of a meeting from Chicago. This is

shown by the record reference to which the Board's brief itself refers (R. 161-162).

18. "The strike, called as it was * * * at a time when their request for a further meeting had been ignored for several days, was caused * * * by respondent's refusal to bargain collectively." (Board's brief, pp. 35-36)

No union request for a further meeting was ever "ignored" by Wards. The Board itself found that "Dixon offered, however, to permit negotiations to be carried on at Oakland if it were impossible for the respondent to send a representative to Portland" (R. 49). This was on December 5, as a result of a call from Wards' local manager in response to Dixon's call on the previous day.

On December 6th, Powell met at Oakland with White, who as the Board found "assured Powell that since they were making progress in their Oakland negotiations he would see that no strike action was taken at Portland" (R. 49). Yet the Portland strike began December 7th (R. 49).

To say that Wards had for "several days" before the strike "ignored" the request of Dixon for a meeting, to imply that by so doing Wards "refused to bargain collectively", and to allege this as the cause of the Portland strike, is to scrap the Board's own findings as well as to defy the record.

CONCLUSION.

The Board's decision and order in the present case employed nearly every device available to an administrative agency which seeks to proceed in an arbitrary fashion untrammelled by the traditional concepts of fair play and justice. The Board misconstrued the law. The Board attempted to usurp powers which Congress never intended to grant it. The Board sought to disguise the exercise of

a managerial authority over Wards' affairs by concealing the true purport of its decision. The Board misstated the facts. The Board went outside the record in its attempt to find an excuse for condemning Wards. The Board treated the mere holding of an opinion as to the nature of the duty to bargain with which the Board disagreed as an offense in itself. The Board disregarded undisputed evidence when it was embarrassing to the Board's argument. The Board drew inferences from facts which did not begin to support them. The Board employed adjectives and innuendo which no fair-minded reader of the record could excuse.

But counsel for the Board have gone even further. They have attempted to support the Board's findings by misstating the purport of the authorities they cite. They have attempted to urge upon this Court supposed facts not to be found in the Board's own findings. They have misstated the facts many times. They have attempted to prejudice this Court by reference to matters never introduced into evidence. They have concealed facts from this Court the knowledge of which emphasizes the impropriety of the arguments advanced outside of the record.

This behavior of the Board, and this conduct of Board's counsel, provide the proof, if proof be needed, that the best of laws may become an excuse for arbitrary and tyrannical conduct, and that judicial review of administrative abuses is an essential safeguard of the rights of a free people.

Respectfully submitted,

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No. 10108

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10108

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v.

MONTGOMERY WARD & COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

In this case the Board petitioned this Court for enforcement of its order pursuant to Section 10 (e) of the Act, and the Company thereafter cross-petitioned to review and set aside the order pursuant to Section 10 (f) of the Act. The Company heretofore filed a full yellow-cover brief containing 69 pages which is denominated its brief upon its cross-petition. It has now filed a blue-cover brief of 56 pages which it denominated its brief upon the Board's petition for enforcement. The petition and cross-petition relate to a single cause, hence the Company is not complying with the rules of this Court in filing two principal briefs aggregating 125 pages.

The blue brief is of a character impelling certain general remarks. Instead of assisting the Court by coming to grips with the main issue whether evidence supports the Board's ultimate finding that the Company (hereafter called respondent) has not bargained in good faith, respondent seeks to divert the Court's attention from this crucial and controlling issue; both of respondent's briefs will be searched in vain for any recitation, chronological or otherwise, of the course of the negotiations which compelled the Board to find that respondent had engaged in unfair labor practices. Instead, respondent recites abstract, general, and on the whole inaccurate propositions of law. Moreover it has repeatedly injected into the case findings which it baselessly asserts the Board made, and attacks the Board upon the basis of these fictitious findings. Moreover, respondent hurls wholly unfounded allegations of unfairness and misrepresentation against the Board and its counsel. The Court will at once see through respondent's appeal to prejudice and dismiss it for what it is worth. Nor will this Court be diverted from the issue in the case by respondent's laborious efforts (see Point II, *infra*, pp. 15-18) to persuade the Court that it must subject the Board's findings herein to a scrutiny far in excess of that sanctioned by any other court, and must remand the case to the Board for reconsideration if it even be suggested that any immaterial error of law lurks in any subsidiary finding, no matter how remote from the Board's ultimate finding. We shall attempt in the following pages, while adhering as closely as possible to the central issue in the case and buttressing

our position with facts rather than epithets, to point out the error of respondent's contentions.

I

Respondent's contentions concerning the interpretation of the bargaining provisions of the act are clearly without merit

A. The contention that the Board in determining whether an employer is bargaining in good faith may neither take into consideration the employer's lack of "willingness to modify demands" nor "pass judgment on the reasonableness of the terms on which an employer insists"

While these two contentions are discussed separately in respondent's briefs (blue brief, pp. 13-14, 17-24, yellow brief, pp. 25-29), they are so related, in that they both in effect challenge the Board's power to appraise an employer's good faith in bargaining negotiations, that we shall discuss them together. In making these contentions, respondent is in effect obliquely renewing the argument which it presented to the Board (see Board's main brief p. 36 and footnote 18) but which it is now unwilling to urge openly in this Court, namely, that the Board is not entitled to appraise the employer's good faith in bargaining negotiations. It should be noted that the Board did not find that respondent's failure to offer concessions constituted a refusal to bargain, nor did the Board specifically find that respondent's lack of "willingness to modify demands" reflected upon its good faith in the negotiations.¹ Hence, this conten-

¹ The quoted phrase was merely used by the Board in the course of its general definition of collective bargaining. Moreover, only by lifting the phrase from its context is respondent afforded a basis for arguing that the Board interpreted the Act as requiring an employer to make concessions. The whole statement from which the phrase was lifted justifies no such interpretation (R. 56):

"Manifestly, in exploring the possibilities of reaching an agree-

tion is wholly irrelevant to the issues in the case.² We mention this contention only because it demonstrates so clearly respondent's unwillingness to accept the proposition, so thoroughly established in the law that respondent no longer openly contends to the contrary, that the Board has the power to appraise an employer's good faith in bargaining negotiations (see Board's main brief, pp. 36-38).

While an employer is free not to make concessions if honestly persuaded that they ought not be made, the Board may assess an employer's adamant "unwillingness to modify demands in accordance with the total situation" revealed by the course of the negotiations as one factor indicating lack of good faith. With this proposition the courts uniformly agree. *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 131, 136 (C. C. A. 7), cert. denied, 313 U. S. 595; *National Labor Relations Board v. George P. Pilling & Son Co.*, 119 F. (2d), 32, 37 (C. C. A. 3); *Rapid Roller Co. v. National Labor Relations Board*, 126 F. (2d) 452, 459-460 (C. C. A. 7). Hence, even if the Board had based its finding in part (though it did not in fact

ment the open and fair-mindedness and sincerity of purpose required by the Act contemplates an interchange of ideas, the communication of facts peculiarly within the knowledge of either party, personal persuasion, and willingness to modify demands in accordance with the total situation thus revealed."

With this statement as a whole there can be no disagreement.

² It is demonstrative of respondent's determination to avoid discussion of the main issues in the case that respondent should lead off its discussion of the Board's asserted misinterpretation of the law (blue brief, pp. 12-17) with a point which is not involved in the case.

do so) on respondent's unwillingness to make concessions in accordance with the total situation, it would have committed no error.

In urging that the Board lacks the power to pass judgment on the general reasonableness of the terms upon which an employer insists, respondent further refuses to accept the well established proposition that good faith is a basic element of the duty to bargain collectively and that the Board is entitled to inquire into that question. The Board, of course, may not, and does not presume to, dictate the terms which an employer must offer or accept. But it is entitled to inquire whether the employer's terms are within or without that broad range consistent with good faith bargaining. To compel the Board to accept at its face value any position and explanation offered by an employer, no matter how specious and unreasonable, would wholly deprive the Board of its principal means of measuring an employer's good faith and leave the Board nothing but the empty task of seeing that the employer goes through the motions of collective bargaining, even when the motions are "mere shadow-boxing." *Stonewall Cotton Mills v. National Labor Relations Board*, 10 L. R. R. 514 (C. C. A. 5). The right of the Board to pass upon the reasonableness of the employer's reasons for resisting certain provisions was expressly sustained by the Circuit Court of Appeals for the Seventh Circuit in *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 131, 138, cert. denied 313 U. S. 595. There the Court stated:

Obviously petitioner was not bound to accept any particular provision. The only question is

as to whether its resistance was bona fide. The Board believed that the petitioner's expressed reason for rejecting the lock-out provision was specious and that petitioner disclosed its lack of good faith when it said that lock-outs were prohibited and that the clause was therefore, unnecessary.

See also *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 550, and our principal brief, pp. 36-38.

B. The contention that the Board in testing the respondent's good faith erroneously gave weight to its refusal to agree to do what the law compelled it to do at any event

1. Respondent's refusal to agree to reduce to writing whatever agreements might be reached

In discussing this aspect of the case (yellow brief, pp. 42-43), respondent fails to point out the undisputed fact that at the September 19 meeting, in response to Union Representative Dixon's inquiry whether, if an agreement was reached, respondent would sign an agreement, Powell replied that "so far as [he] knew at that time, [he] didn't know of any contract in existence between the Company and labor organizations." These are Powell's own words (R. 857). At the November 25 conference, Powell again refused to commit respondent to sign, should an agreement be reached (see our main brief, pp. 12, 25-26). The Board characterized this conduct as a refusal to "agree to embody understandings that might be reached with the unions in signed contracts" (R. 58). Certainly Powell's rejoinder was not that of a negotiator interested in assuring the employee representatives of his good faith, and the Board properly drew an inference therefrom ad-

verse to respondent.³ The charges in respondent's yellow brief (p. 42) that the Board drew an inference therefrom which the facts do not justify is wholly unwarranted.⁴

2. Respondent's refusal to bind itself to recognize the Unions and to refrain from discrimination against their employees

Respondent's view (yellow brief, p. 44, blue brief, p. 15) is that collective bargaining agreements should exclude provisions obligating the employer to do what he is already compelled to do as a matter of law. Such a proposition finds no justification either in reason or in actual practice. The purpose of the collective bargaining agreement is as the authorities agree, to stabilize the employer-employee relationship and to serve as a permanent memorial of the basic conditions of employment. In this relationship recognition is of the essence. It is reasonable, therefore, that recognition should be one of the first matters covered in a collective

³ Contrast Powell's rejoinder with that of Barr in the subsequent Board case involving respondent's Schwinn Warehouse at Chicago (39 N. L. R. B., No. 41), referred to in respondent's blue brief at pp. 45-46, wherein Barr replied to a similar inquiry—"We will sign anything to which we will agree." It would have been so easy for Powell to have made some similar reply during the negotiations in the instant case, but throughout the negotiations he steadfastly refused to do so.

⁴ The inference which respondent (blue brief, p. 46) seeks to have the Court draw from respondent's newspaper announcement on March 21, 1941, that it would reduce to writing and sign any agreement reached, overlooks the fact (1) that this happened long after the bargaining conferences in the instant case had terminated, and (2) that it was obviously occasioned by the Supreme Court's decision, on January 6, 1941, in *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, which demonstrated that respondent's previous conduct in refusing to sign was in violation of the law.

bargaining agreement, and, as a matter of fact, such is the common procedure in actual practice.⁵

The fact that recognition is required by law under certain circumstances is plainly no reason for refusing to agree to it. Recognition is not an automatic matter; it is up to the employer to confer it. A specific grant of recognition in a collective bargaining agreement removes all uncertainty concerning a matter of vital importance to the employees and thus contributes to industrial peace.⁶ Recognition is clearly a proper subject matter of agreement in a collective bargaining contract; respondent's refusal to obligate itself to confer it is of obvious significance on the issue of good-faith bargaining. See our main brief, pp. 26-27.

In its yellow brief at p. 44, respondent mistakes the purport of the holding of the Court in *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. (2d)

⁵ See *Written Trade Agreements in Collective Bargaining*, Bulletin No. 4, National Labor Relations Board, November 1939, a comprehensive study of trade agreements and their role in collective bargaining. In the section dealing with the contents of written agreements it is stated that the provisions of trade agreements may be roughly divided into four sections, the first of which normally "describes the processes of collective bargaining and indicates the status of the union, i. e., explicitly grants union recognition" (p. 39; see also p. 16).

⁶ Evidence of the importance of recognition to employees is found in the statistics put out by the United States Bureau of Labor Statistics as to the causes of strikes. As late as 1941, 9.4 percent of all strikes were caused solely by the employer's refusal to grant recognition; these resulted in 10.7 percent of the man-day idleness in 1941. These figures do not take into consideration any of the many strikes in which the employer's failure to grant recognition was a contributing cause of the strike. See *Monthly Labor Review*, May 1942, Vol. 54, No. 5, p. 1125.

748, 751 (C. C. A. 7). A reading of the whole discussion of this point establishes beyond question that the Court in stating that "the recognition required by Section 9 (a) is not a bargaining matter" meant that the employer, without quibbling about the matter, must agree *in a contract* to a clause providing for exclusive recognition. The Court so held, notwithstanding the claim, identical with the claim made in this case, that the employer had in fact granted exclusive recognition.

We have fully treated in our main brief (pp. 27-28), respondent's contention concerning its refusal to agree to a nondiscrimination clause; it should be noted that the Board did not construe the Act, as respondent erroneously asserts on p. 15 of its blue brief, "as imposing an absolute duty to agree" to a nondiscrimination clause, but rather found (R. 61-62) that "respondent, by this 'refusal to do what reasonable and fair-minded men are ordinarily willing to do,' demonstrated its refusal to bargain collectively in good faith." This was by no means the only factor upon which the Board relied in reaching its ultimate conclusion concerning respondent's refusal to bargain, but only one of many (R. 62); nor, as respondent would have the Court believe, was it regarded by the Board independently and apart from everything else in the record as justifying a finding of a refusal to bargain. Respondent's strategy throughout its brief has been to approach piecemeal numerous factors which the Board found, in the aggregate, evidenced respondent's lack of good faith in the negotiations. The sole issue here is whether the Board's ultimate finding is warranted by the whole of the evidence.

C. The contention that the Board erroneously considered respondent's solicitation of striking employees to return to work in reaching its conclusions concerning respondent's refusal to bargain

Here again respondent strives to confuse the issues by insisting (yellow brief, pp. 60-62, blue brief, pp. 16-17) that the Board found that its solicitation⁷ of the individual striking employees to return to work constituted "a *per se* violation of Section 8 (5)" of the Act. The Board's finding in full makes it plain that respondent's solicitation was but one of the factors which, when viewed in light of the other factors upon which the Board rested its ultimate finding, warranted an inference unfavorable to respondent's good faith in the negotiations. Thus the Board found (R. 67):

Finally, the respondent, as noted below, solicited the individual striking employees to return to work in violation of Section 8 (1) of the Act. The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees in the appropriate units herein found and such conduct re-

⁷ There is no basis whatever for respondent's argument (blue brief, pp. 25-26) that the Board erroneously drew an inference of bad faith from the coercive statements of Superintendent McGowan. It was respondent's "solicitation" from which the Board drew an inference unfavorable to respondent. The Board treated respondent's telephonic activities as "solicitation" while McGowan's conduct was dealt with as "coercive statements" (R. 67, 73-74). While the Board held that both respondent's solicitation and McGowan's statements interfered with respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 74), the Board confined its attention to respondent's having "solicited the individual employees to return to work" (R. 67) in appraising respondent's good faith in the negotiations. The Board further spelled out what it meant by "solicitation" in

flects on its good faith in the collective bargaining negotiations.

The facts amply justify this appraisal. The pointed action of respondent's superintendents, at a time when the employees were out on strike because of respondent's refusal to deal in good faith with their representatives, in calling them individually on the telephone on a non-working day to announce that their jobs were open for them, was palpably a maneuver to break the solidarity of the strikers. The inference that by such solicitation respondent was "seeking to induce the striking employees to desert the unions and abandon their concerted activity" (R. 74) is a reasonable one on all the facts. Respondent's solicitation when thus viewed plainly warranted the Board's conclusion that respondent was not dealing with the Unions with the good faith required by the Act.

In citing (yellow brief, p. 61, blue brief, p. 16) *Wilson & Co. v. National Labor Relations Board*, 120 F. (2d) 913 (C. C. A. 7) in support of its argument that the solicitation under the circumstances of this case was lawful, respondent disregards the crucial distinction that in the instant case the strike was an unfair labor practice strike, having been caused by respondent's refusal to bargain collectively in good faith with the

terms applicable only to respondent's telephonic activities, as follows:

"communicating with the employees directly through its supervisory employees, and by stating to the employees that 'we are operating tomorrow as usual and your job is open for you if you want to come in'" (R. 74).

The charge of ambiguity which respondent levels against the Board's finding is thus entirely without foundation.

Unions, while in the *Wilson* case the Board found that the strike was not caused by unfair labor practices, as the Court pointed out (120 F. (2d), at 916). Compare *Ritzwoller Co. v. National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7) in which the same Court held that the posting of a notice stating that "this plant will resume operations on Monday, July 26th, under the same terms and conditions as the plant has run in the past" constituted compelling evidence on the issue of a refusal to bargain (114 F. (2d), at 436).

D. The contention that an employer is under no obligation to make any affirmative efforts to reach an agreement with his employees

In its blue brief (p. 33), respondent still insists upon its position taken in its brief before the Board, namely, that the duty to bargain is no more than the duty to meet with the employee representatives and do or say nothing which would make a binding trade agreement impossible.⁸ Our main brief at pp. 30-33 demonstrates

⁸ This is precisely the position for which respondent contended in its brief before the Board and which it now complains the Board improperly cited as evidence of a "negative attitude" in collective bargaining (blue brief, p. 30), implying that this was a view of the law which was respondent's counsel's alone. With respondent's counsel here again arguing that this is the proper view it seems incomprehensible that counsel should take offense at the Board's attributing this view to respondent. Apart from this, however, there is no rational basis for distinguishing counsel from respondent. Stuart S. Ball, respondent's counsel before the Board, as well as in this Court, is secretary of respondent (R. 21, 96, 99), hence, any differentiation between counsel and his client, such as is urged on pp. 30-31 of respondent's blue brief, is purely artificial. Furthermore, Ball, if not the sole arbiter of respondent's collective bargaining policy, was at least the official of respondent to whom Powell and Barr looked for guidance in collective bargaining matters (Resp. Exh. 18, R. 733-734). Par-

the error of this position, and cites the controlling authorities fully sustaining our position. The authorities cited by respondent (blue brief, pp. 32, 34) are inapposite. *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, merely holds that an employer is not required to initiate bargaining negotiations in advance of a request from the employees. The *dictum* cited by respondent from *Wilson & Co. v. National Labor Relations Board*, 115 F. (2d) 759, 764 (C. C. A. 8), also has this plain meaning. This is a far cry from the proposition, which respondent urges, that the employer need take no initiative in the negotiations once they have been commenced by the employee representatives. That the Court in the *Wilson* case contemplated that the employer is required to take some initiative in the negotiations once they have been begun is at once evident from the fact that the Court stressed that the employer "had failed to submit counter offers to the Union at the time it rejected the Union's proposals" as a factor supporting the Board's conclusion of refusal to bargain (115 F. (2d), at 762). The *Wilson* case, therefore, instead of sustaining respondent's position, squarely supports the Board's view.

Respondent's further claim (blue brief, pp. 34-36) that the Board found that respondent had violated the Act simply by entertaining the belief that the Act required no affirmative efforts on its part to reach an agreement is without basis. Once again respondent

ticularly unwarranted in this situation are the charges of unfairness which respondent so readily hurls against the Board in connection with this aspect of the case.

seeks to divert the Court's attention from the issue in controversy by charging the Board with doing something which it did not do. The Board found a violation on the basis of respondent's actual conduct and not merely because of its state of mind (see R. 64-65). The Board's concluding finding makes this abundantly clear (R. 65) :

We are of the opinion, and find, that the respondent's attitude and *conduct* with respect to the union requests for counterproposals evidence "a want of good faith and, hence, a refusal to bargain " [*Italics supplied.*]

Respondent's alternative and somewhat inconsistent argument that although it was not required to take any initiative in the negotiations, it in fact did so, is simply not borne out by the facts. We have shown in our main brief at pp. 7-8, 11-12, 18-19, 22, 30-33, that respondent steadfastly refused to submit to the Unions any counterproposals although repeatedly requested to do so, and that when the Unions pleaded with respondent to give some suggestion as to what provisions it would be willing to agree to, respondent refused, declaring that it was up to the Unions "to make proposals that would please" respondent.

We are at a loss to understand respondent's reliance (blue brief, pp. 28-29) on Board's Exhibits 10 and 12 (copies of the proposed agreements of the Retail Clerks and the Warehousemen, upon which the Unions' representatives had noted respondent's comments concerning their proposals) as examples of affirmative efforts on its part to find a basis of agreement with the Unions. If Board's Exhibits 10 and 12 contain the best evidence

to which respondent can point as proof of its affirmative efforts to reach an agreement with the Unions, respondent's case is weak indeed, for these very exhibits establish the meagerness of respondent's efforts to find a basis for agreement. Of the 41 sections in Board's Exhibit 10 (R. 531-537) no suggestion was recorded as to 34 of the sections which included the Unions' principal proposals. Respondent's main contribution towards reaching an accord with the Warehousemen, as shown by Board's Exhibit 12, was the striking out of two-thirds of the agreement. Respondent could hardly have done less than is indicated on Board's Exhibits 10 and 12 and maintained even the pretense of bargaining.

II

Respondent totally misconceives the permissible scope of review of orders of the board

Respondent's complete lack of confidence in its whole case is evident from the argument which respondent interweaves throughout both of its briefs (yellow brief, pp. 64-68, blue brief, pp. 7-12, 47) that regardless of whether the record contains evidence which substantially supports the Board's ultimate finding, the cause must be remanded to the Board for further proceedings if the Court "no more than suspects that the Board acted under an erroneous view" of the Act in any respect, no matter how minor. In making this novel contention, respondent urges a scope of review of orders of the Board far in excess of that sanctioned by the authorities. The function of the Courts in reviewing orders of the Board is confined to determining

whether there is substantial evidence to support the Board's ultimate finding, and whether the order is appropriate. *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 586, 597; *National Labor Relations Board v. Waterman Steamship Corp.* 309 U. S. 206, 208-209, 226; *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 62 S. Ct. 960. If under a correct view of the law the Board's ultimate findings were justified by the facts as found by the Board, the Court has no alternative but to enforce the Board's order, notwithstanding that the Board might have made some error on some subsidiary point of law. The Supreme Court specifically pointed this out in *Helvering v. Rankin*, 295 U. S. 123, 132-133, relied on by respondent (blue brief, p. 6):

But even if the Board's decision had been based on an erroneous rule of law, that would not have justified its reversal, if the findings of fact, governed by the correct rule of law, were sufficient to sustain the decision and had substantial support in the evidence.

Cf. *Helvering v. Gowran*, 302 U. S. 238, 245-246.

In none of the many cases involving the Board in the Supreme Court has the refinement which respondent suggests ever been intimated. To the contrary, even where the Board has made an error of fact upon which an ultimate conclusion in part rests, the Courts have shown no hesitancy in enforcing the Board's order if other substantial support for the Board's ultimate finding and order is found in the record. Thus in *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Corp.*, 308 U. S. 241, 247, the Court stated:

The respondent criticizes several of the findings as without support or contrary to uncontradicted evidence. We do not stop to consider these contentions, since without such findings, there would still be a basis in the record for the Board's conclusions.⁹

In *United States v. Carolina Freight Carriers Corp.*, 62 S. Ct. 722, and *Howard Hall Co. v. United States*, 62 S. Ct. 732, cited by respondent on pp. 11-12 of its blue brief, the error of law which in the Court's opinion warranted the remand concerned, as the Court noted, "basic or essential findings" upon which both cases hinged (62 S. Ct., at 729). This is also true of the other decisions cited by respondent including *Texas Co. v. National Labor Relations Board*, 120 F. (2d) 186 (C. C. A. 9); *District of Columbia v. Murphy*, 62 S. Ct. 303; and *National Labor Relations Board v. Virginia Electric and Power Co.*, 314 U. S. 469. Where basic findings are erroneous, a remand is, of course, appropriate. But in the instant case even if it be assumed, without conceding, that the Board did err in one or more of the subsidiary respects claimed by respondent, the Board's order is nevertheless entitled to enforcement for the reason that, as in the *Newport News* case, there remains substantial evidence under a

⁹ To the same effect are *Colorado Fuel and Iron Corp. v. National Labor Relations Board*, 121 F. (2d) 165, 174 (C. C. A. 10); *National Labor Relations Board v. M. A. Hanna Co.*, 125 F. (2d) 786, 789 (C. C. A. 6); *National Labor Relations Board v. Yale & Towne Manufacturing Co.*, 114 F. (2d) 376, 379 (C. C. A. 2); *Consumers Power Co. v. National Labor Relations Board*, 113 F. (2d) 38, 43 (C. C. A. 6); *Continental Box Co. v. National Labor Relations Board*, 113 F. (2d) 93, 96-97 (C. C. A. 5).

proper view of the law which fully supports the Board's ultimate finding and order.

CONCLUSION

It is respectfully submitted that respondent's contentions concerning the proper interpretation of the bargaining provisions of the Act are without merit, that the facts, under a correct interpretation of the Act, fully justify the Board's ultimate finding that respondent refused to bargain collectively in good faith with the Unions, and that the Board's order is entitled to full enforcement as prayed in the Board's petition for enforcement.

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